TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. 21 8[illegible]

ALBERT MARTIN COHEN, PETITIONER,

vs.

DENIS M. HURLEY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED MAY 7, 1960
CERTIORARI GRANTED JUNE 6, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 921

ALBERT MARTIN COHEN, PETITIONER,

vs.

DENIS M. HURLEY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of ALBERT MARTIN COHEN, an Attorney, Respondent-Appellant,

DENIS M. HURLEY, Petitioner-Respondent.

STATEMENT UNDER RULE 234

This is an appeal from an order of the Supreme Court, Appellate Division, Second Department, dated December 31, 1959, and entered on the 31st day of December, 1959, in the office of the Clerk of the Appellate Division, whereby it was ordered, one Justice dissenting, that appellant be disbarred from the practice of the law.

This proceeding was instituted by an order to show cause dated the 13th day of July, 1959, and a petition of Denis M. Hurley, verified July 9, 1959, with the exhibits thereto annexed.

The appellant duly served and filed his answer on or about July 31st, 1959.

The parties to this proceeding are the appellant Albert Martin Cohen.

The respondent is Denis M. Hurley, attorney pro se.

The attorney for the appellant is David F. Price.

There has been no change of parties or attorneys herein.

[fol. 2]

IN SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of ALBERT MARTIN COHEN,
An Attorney, Respondent.

NOTICE OF APPEAL—January 7, 1960

Please Take Notice that Albert Martin Cohen, respondent above named, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court for the Second Department, dated December 31st, 1959, and entered on the 31st day of December, 1959, in the office of the Clerk of the Appellate Division, Second Department, whereby it was ordered, one Justice dissenting, that respondent be disbarred from the practice of the law, and from each and every part thereof.

Dated: January 7th, 1960.

David F. Price, Attorney for Respondent, 66 Court Street, Brooklyn, New York.

To:

Hon. Denis M. Hurley, Attorney for Petitioner, Borough Hall, Brooklyn, New York.

Hon. John J. Callahan, Clerk of the Appellate Division, Second Department.

[fol. 3]

IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

Present:

Hon. Gerald Nolan, Presiding Justice, Hon. Henry G. Wenzel, Jr., Hon. George J. Beldock, Hon. Henry L. Ughetta, Hon. Philip M. Kleinfeld, Justices.

ORDER APPEALED FROM—December 31, 1959

Order of Disbarment

A proceeding having been instituted by Denis M. Hurley, Esq., by petition verified the 9th day of July, 1959, for an order directing that the respondent Albert Martin Cohen (admitted Second Judicial Department on December 6th, 1922), be disciplined upon the charges set forth in said petition, and for such other and further action upon the charges embodied in said petition, as justice may require, and for such other and further relief in the premises as may be just and proper, and the respondent Albert Martin Cohen having filed an answer verified July 31st, 1959, and the said proceeding having come on to be heard by an order to show cause, dated July 13, 1959.

[fol. 4] Now on reading and filing said order to show cause, the petition, the answer, respondent's brief and respondent's reply brief, the exhibits, the testimony of respondent before the Additional Special Term, and all the papers filed herein, and Mr. Denis M. Hurley, petitioner, appearing in person, and Mr. David F. Price appearing for respondent, and due deliberation having been had thereon; and upon the majority opinions of the court herein, heretofore filed:

It Is Ordered that by reason of the misconduct established by the evidence, the said Albert Martin Cohen, be and he hereby is disbarred and removed from the office of attorney

and counselor at law, and the name of said Albert Martin Cohen ordered struck from the roll of attorneys of the State of New York as of the date of entry of this order, and it is

Further Ordered, pursuant to the appropriate provisions of the Judiciary Law of the State of New York, that the said Albert Martin Cohen is hereby commanded to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another, and is forbidden to appear as attorney and counselor at law before any court, judge, justice, board, commission or other public authority or to give to another an opinion as to the law or its application or any advice in relation thereto, and it is

Further Ordered that the respondent, Albert Martin Cohen, have leave to apply to vacate this order upon proof that, within 30 days after the entry of this order, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such [fol. 5] Justice all relevant records in accordance with the subpoena duces tecum.

Opinion by Beldock, J. Wenzel and Ughetta, JJ., concur with Beldock, J., Nolan, P.J., concurs in separate opinion; Kleinfeld, J., dissents and votes to dismiss the proceeding, in opinion.

Enter:

John J. Callahan, Clerk.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 6]

IN SUPREME COURT OF THE STATE OF NEW YORK.

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

ORDER TO SHOW CAUSE—July 13, 1959

Upon reading and filing the annexed petition of Denis M. Hurley, verified the 9 day of July, 1959, with the exhibits thereto annexed, it is

Ordered, that the respondent, Albert Martin Cohen, show cause before this Court at the Courthouse, 45 Monroe Place, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 14th day of July, 1959, at Ten o'clock in the Forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made herein directing that the respondent, Albert Martin Cohen, as an attorney and counselor-at-law, be disciplined upon the charges set forth in the annexed petition, and why such other or further action upon the charges embodied in the annexed petition, as justice may require, should not be had and for such other and further relief in the premises as may be just and proper.

Sufficient reason appearing therefor, it is

Ordered, that service of a copy of this order and of the petition with exhibits annexed upon the respondent on or before 5 P. M. the 13th day of July, 1959, shall be deemed sufficient.

Dated: Brooklyn, New York, July 13th, 1959.

George J. Beldock, Associate Justice, Appellate Division, Supreme Court, Second Judicial Department.

[fol. 7]

IN SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

PETITION, READ IN SUPPORT OF MOTION—July 9, 1959

To the Honorable Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department:

The petition of Denis M. Hurley respectfully alleges:

1. That by an order of this Court dated and filed June 22, 1959, a copy of which is annexed marked Exhibit A, petitioner was duly designated and directed to institute in this Court disciplinary proceedings against the respondent, Albert Martin Cohen, as an attorney and counselor-at-law, based upon his misconduct as an attorney and counselor-at-law, as recommended in the report of Hon. Edward G. Baker, a Justice of the Supreme Court of the State of New York, filed with the Clerk of this Court on June 8, 1959, and as indicated in the evidence and exhibits presented before the Additional Special Term of this Court in a proceeding established by order of this Court dated January 21, 1957, as amended by order dated February 11, 1957, all as more fully hereinafter described.

[fol. 8] 2. That said order of June 22, 1959, was duly entered in the proceeding established by the said order of January 21, 1957, as amended by order dated February 11, 1957, which is entitled, "In the Matter of the Petition of the Brooklyn Bar Association for a Judicial Inquiry by the Court into certain alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice, by Attorneys and Counsellors-at-law and by others acting in Concert with them in the County of Kings," (hereinafter called "Judicial Inquiry and Investigation"). A copy of the said order of January 21, 1957 and a copy of the amending order of February 11,

1957 are annexed hereto as a single exhibit, marked Exhibit B.

3. Upon information and belief, that the respondent, Albert Martin Cohen, was admitted to practice as an attorney and counselor-at-law in the Courts of the State of New York at the December, 1922 Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and has ever since acted as such attorney and counselor-at-law.

4. That the respondent, Albert Martin Cohen, resides in the County of Kings, State of New York, and that at all times hereinafter mentioned he was an attorney practicing law with an office in the County of Kings, State of New York.

5. That at all of said times the respondent, Albert Martin Cohen, practiced law in the Courts of the County of Kings, State of New York.

[fol. 9] 6. That at all relevant times hereinafter mentioned the respondent, Albert Martin Cohen, also practiced law in association or in partnership with Louis I. Rothenberg, under the name of Cohen & Rothenberg, with offices at 16 Court Street, in the County of Kings, State of New York.

7. During the course of the Judicial Inquiry and Investigation that was directed to be made by the aforesaid order of this Court dated January 21, 1957, the respondent, Albert Martin Cohen, in response to a subpoena served upon him, appeared before Mr. Justice George A. Arkwright, then presiding at the Additional Special Term of this Court, on October 28, 1958.

8. Except to acknowledge that he was admitted to practice law in December, 1922 in the Second Judicial Department, the respondent, Albert Martin Cohen, refused to answer all of the questions that were asked of him before the Additional Special Term on October 28, 1958 on the ground that the answers to the questions might tend to incriminate or degrade him. A complete and accurate transcript of the proceedings before the Additional Special Term on Octo-

ber 28, 1958 relating to the respondent, Albert Martin Cohen, is annexed hereto and marked Exhibit C.

9. Pursuant to a subpoena *ad testificandum* and a subpoena duces tecum, both served upon him on May 11, 1959, the respondent, Albert Martin Cohen, appeared with his counsel, David F. Price, Esq., before Mr. Justice Edward G. Baker presiding at the Additional Special Term of this Court, on May 19, 1959.

[fol. 10] 10. The aforesaid subpoena duces tecum served May 11, 1959 required respondent to produce:

"The following records pertaining to any action, claim or proceeding for damages for personal injuries or property damage or for death or loss of services resulting from personal injuries wherein you or the law firm of Cohen and Rothenberg accepted, during the period January 1, 1954 through December 31, 1958 inclusive, a retainer to act as attorney or of counsel for the plaintiff or claimant whereby your compensation or the compensation for the law firm of Cohen and Rothenberg for services rendered was to be contingent, in whole or in part, upon the successful prosecution or settlement of any such action, claim or proceeding:

1. (a) Day Book (reflecting daily receipts); (b) Cash Receipts Book; (c) Cash Disbursements Book; (d) Check Book Stubs; (e) Petty Cash Book; (f) Petty cash vouchers; (g) General Ledger and General Journal; (h) Canceled checks, bank statements, duplicate deposit slips of regular, personal and special checking accounts, open and closed; (i) Pass Books and evidences of accounts with all depositories other than check accounts, set forth above, such as savings bank, savings and loan association, postal savings, credit unions, etc.;

2. All pleadings, records and other papers; and

3. All data and memoranda of the disposition of any such action, claim or proceeding including closing state-
[fol. 11] ments required by Rule 4 of the Special Rules

Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department,"

11. On May 12, 1959, prior to the appearance of the respondent, Albert Martin Cohen, before the Additional Special Term, he was furnished with a copy of the aforesaid order of this Court made January 21, 1957 together with a copy of the amending order dated February 11, 1957. At the same time, copies of said orders were similarly furnished to the respondent's attorney, David F. Price, Esq.

12. (a) After being called as a witness to testify before the Additional Special Term on May 19, 1959 as aforesaid (s.m. 22611 *et seq.*), counsel for the Judicial Inquiry then offered and there was received in evidence the original Statements as to Retainers covering personal injury cases filed on behalf of or by the respondent, Albert Martin Cohen, in compliance with Rule 3 of the Special Rules of the Appellate Division for each of the years 1954 through 1958 inclusive (s.m. 22617-22619). The number of Statements as to Retainers filed in each of said years is:

1954 — 36	retainers	(Exhibit 1191).
1955 — 56	"	(" 1192).
1956 — 53	"	(" 1193).
1957 — 49	"	(" 1194).
1958 — 34	"	(" 1195).
228	total retainers.	

[fol. 12] (b). During the same period 1954-1958, there was filed with the Appellate Division, Second Department, a total of 76 Statements as to Retainers in personal injury cases for or on behalf of the law firm of Cohen and Rothenberg comprising the respondent, Albert Martin Cohen and Louis I. Rothenberg, with offices at 16 Court Street, Kings County, New York. The originals of the 76 Statements as to Retainers were offered and duly received in evidence by the Additional Special Term (s.m. 22619-22620; Exhibits 1196 and 1197).

13. After the receipt in evidence of the Statements as to Retainers referred to in paragraph 12 (a) and (b) hereof,

the respondent, Albert Martin Cohen, was asked to produce the particular records enumerated in the subpoena duces tecum referred to and quoted in paragraph 10 above. The respondent was also asked a series of questions relating to his professional conduct. Among the questions thus asked of the respondent were the following:

"Q. Mr. Cohen, do you have custody or possession of the records of those cases reflected in the statements of retainer that you filed with the Appellate Division for the years 1954 to 1958, inclusive, which were offered in evidence today?" (s.m. 22627)

• • • • • • • •

"Q. Do you have custody or possession of the records of the law firm of Cohen & Rothenberg for such statements of retainer that were filed during that period of 1954 through 1958?" (s.m. 22627)

• • • • • • • •

[fol. 13] "Q. Would you state, please, if a bank account was maintained during the period 1954 to 1958 for the law practice or affecting the law practice of Cohen & Rothenberg, and, if so, in what bank was such firm account maintained?" (s.m. 22628)

• • • • • • • •

"Q. • • • With respect to the statements of retainer that have been received in evidence earlier, did you ever employ an agent or a so-called runner to secure any of these claimants as your clients whose names are indicated in the statements of retainer?" (s.m. 22633)

• • • • • • • •

"Q. Mr. Cohen, did you ever pay or reward any member of the Police Department for referring or bringing to your office a claimant for personal injuries?" (s.m. 22634)

• • • • • • • •

"Q. For the same period during 1954 through 1958, did you ever pay or reward any court or prison employee for referring or bringing to your office a personal injury case?" (s.m. 22635)

• • • • • • • •

"Q. How about employees or any insurance or casualty companies during that same period, did you ever pay or agree to pay any such employees for referring or bringing cases to your office involving claims for personal injuries?" (s.m. 22635)

• • • • • • •

[fol. 14] "Q. A broad question then, sir, to encompass all categories: During that same period did you ever agree to pay, and did you pay, any laymen for referring or bringing personal injury cases to your office?" (s.m. 22635-22636)

• • • • • • •

"Q. Did you ever make any cash advances to any lay person as an inducement to refer personal injury cases to your office with a promise that upon any settlement or recovery of any such personal injury case, that lay person would be paid by you an amount equal to 10 per cent of the recovery or settlement?" (s.m. 22636)

• • • • • • •

"Q. Were any personal injury cases ever referred to you or to your office by an Al Frangello?" (s.m. 22636)

• • • • • • •

"Q. Did you ever make any payments or agree to pay or reward a person named Al Frangello, a layman, for referring personal injury cases to you, sir?" (s.m. 22636)

• • • • • • •

"Q. More specifically. Did a Tom Connolly ever refer any personal injury cases to your office?" (s.m. 22637)

• • • • • • •

"Q. Did you ever make any payments or agree to pay, directly or indirectly, one Tom Connolly as a reward for referring personal injury cases to you, sir?" (s.m. 22637)

• • • • • • •

14. Precisely the same questions as those quoted immediately above, except as to change of name, were put to

[fol.15] the respondent, Albert Martin Cohen, with respect to other and different individuals named Joe Marcus, Albert Gaetani, Abe Kaplan, Clifford Bass, Antonio Pecorino, and another individual, identified merely as "Smithy" or "Smitty" (s.m. 22637-22641). Among the questions thus asked of the respondent are the following:

"Q. Do you know the place of employment of Clifford Bass whom I referred to a moment ago?" (s.m. 22638)

• • • • • • •

"Q. Would this refresh your recollection, and what would your answer be as to whether he was employed in one of our City Hospitals?" (s.m. 22638)

• • • • • • •

"Q. Did you ever have occasion to draw your individual check from your law office account, but in your individual name, to represent, or the proceeds of which went to any of the individuals whose names I have just mentioned as part of a reward or payment for referring a personal injury case to your office?" (s.m. 22639)

• • • • • • •

"Q. Would your answer be the same with respect to any checks that may have been drawn on the firm account or partnership account, if one there be, of Cohen & Rothenberg, involving any of these individuals?" (s.m. 22639)

• • • • • • •

[fol. 16] "Q. More specifically, were any checks, either your individual account or the firm account of Cohen & Rothenberg, marked 'Disb' as the abbreviation for disbursement, the proceeds of such checks having been received by these individuals and charged as a disbursement against the particular cases referred by these individuals?" (s.m. 22639)

• • • • • • •

"Q. Mr. Cohen, did you ever engage the services of so-called claims adjusters, non-lawyers, to settle any of

your personal injury cases with insurance companies and casualty companies?" (s.m. 22640)

• • • • • • •

"Q. More particularly with respect to the very claims or cases identified by the names of the clients reflected in the statements of retainer received in evidence here today, did you ever engage the services of an adjuster or a so-called ten percenter to settle any of those particular cases with insurance companies or casualty companies?" (s.m. 22640)

• • • • • • •

"Q. Did you ever make any payments to any so-called adjusters or ten percenters for effecting any settlement or disposition of a personal injury case?" (s.m. 22640)

• • • • • • •

"Q. Mr. Cohen, I preface this question again by saying that if you wish to refer to the statements of retainer that were received in evidence today, I would be glad to give you the opportunity to do so. I want [fol. 17] to ask you with relation to those statements of retainer, have you in each instance truthfully set forth the names or identity of the so-called referrers of the particular cases indicated in the statements of retainer?" (s.m. 22640-22641)

15. The respondent, Albert Martin Cohen, was then asked a number of questions as to the circumstances involving the referral of a personal injury case to him by Louis I. Rothenberg involving a client or a claimant named Patrick McCormack. The said claimant was the subject of a Statement as to Retainer No. 41 filed during the calendar year 1955 by the respondent (s.m. 22641-22644-A).

16. The respondent, Albert Martin Cohen, refused to produce any of the records set forth in the subpoena duces tecum quoted in Paragraph 10 above, upon the ground that the production of such records might tend to incriminate or degrade him.

17. The respondent, Albert Martin Cohen, refused to answer the questions quoted in Paragraphs 13 and 14 above

upon the ground that the answers to such questions might tend to incriminate or degrade him. For similar reasons the respondent refused to answer the questions referred to in Paragraph 15 above.

18. After a brief recess, respondent, Albert Martin Cohen, was advised of the possible serious consequences that might flow from his refusal to answer, as aforesaid, the questions that were propounded to him (s.m. 22649 [fol. 18] *et seq.*); and that respondent's failure to answer "may well give rise to disciplinary action" (s.m. 22655). The respondent was also apprised of pertinent statutory provisions contained in the Judiciary Law and the Penal Law and of particular Canons of Ethics "because they encompass matters that are within or contemplated by the very questions put to you today", and that "Subdivision 2 of Section 90 of the Judiciary Law vests the Appellate Division with power and control over attorneys practicing law in this Department and the Appellate Division is authorized to mete out appropriate disciplinary punishment for anyone proved guilty of professional misconduct or any conduct prejudicial to the administration of justice". (s.m. 22650, 22651 *et seq.*)

19. Following the reference to the pertinent provisions aforesaid and before he was excused from the witness stand, the respondent, Albert Martin Cohen, was given a further opportunity by Mr. Justice Baker to answer the questions that had been asked of him. The respondent, however, stated that his answers to the questions if again propounded, would be the same (s.m. 22659).

20. The complete transcript of the proceedings had before the Additional Special Term on May 19, 1959 as aforesaid, is annexed hereto and made a part hereof, marked Exhibit D.

21. Thereafter and on June 8, 1959, Mr. Justice Baker filed with this Court the aforesaid transcript of the proceedings had before him (Exhibit D annexed hereto), together with his report embodying a recommendation that disci- [fol. 19] plinary proceedings should be instituted against the respondent, Albert Martin Cohen.

22. Thereafter, and on June 22, 1959 this Court made an order (Exhibit A annexed hereto) designating and directing your petitioner to institute in this Court disciplinary proceedings against the respondent, Albert Martin Cohen.

23. The refusal of the respondent, Albert Martin Cohen, to produce the records set forth in the subpoena duces tecum quoted in Paragraph 10 above, and his refusal to answer the questions quoted and referred to in Paragraphs 13, 14 and 15 above, are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that, among other things, such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer to the Court; such refusals are in defiance of and flaunt the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer; by his refusal to answer the aforesaid questions the respondent hindered and impeded the Judicial Inquiry that was ordered by this Court; by his refusals respondent withheld vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession.

24. Accordingly, by reason of the premises, the respondent, Albert Martin Cohen, as an attorney and counselor-at-law, is hereby charged with professional misconduct and conduct prejudicial to the administration of justice.

25. That no previous application has been made for the relief herein asked.

[fol. 20] 26. That the sources of petitioner's knowledge and the grounds of his belief are the facts set forth in the testimony and exhibits taken and adduced before the Hon. George A. Arkwright on October 28, 1958 (Exhibit C annexed hereto) in said Judicial Inquiry and Investigation conducted by him, and in the testimony and exhibits taken and adduced before the Hon. Edward G. Baker on May 19, 1959 (Exhibit D annexed hereto) in said Judicial Inquiry and Investigation conducted by him.

27. That an order to show cause is asked for herein, instead of service of a notice of motion, in order that the

Court may be fully apprised of the charges made against the respondent, Albert Martin Cohen, in advance of the service thereof upon him, and to enable this Court to fix the return date of the order to show cause, all in accordance with the practice observed in such matters.

Wherefore, petitioner prays that an order may issue to the respondent, Albert Martin Cohen, directing that he show cause before this Court why an order should not be made herein directing that respondent, Albert Martin Cohen, be disciplined upon the charges set forth herein, and for such further action as may be contemplated by Section 90 of the Judiciary Law of the State of New York, in accordance with the practice directed to be observed in the disposition of such matters by the Courts of this State.

Dated: Brooklyn, New York, July 9, 1959.

Denis M. Hurley, Petitioner.

(Verified by Denis M. Hurley on July 9, 1959.)

[fol. 21]

EXHIBIT A, ANNEXED TO PETITION

SUPREME COURT

APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS AT LAW AND BY OTHERS ACTING IN CONCERT WITH THEM, IN THE COUNTY OF KINGS.

ORDER DESIGNATING COUNSEL

An order having been made by the Appellate Division of the Supreme Court, Second Judicial Department, dated

January 21st, 1957, as amended by order dated February 11th, 1957, directing that a judicial inquiry and investigation be made (1), with respect to the alleged improper practices and abuses by attorneys and counselors at law in Kings County, and by persons acting in concert with them, as alleged in the petition of the Brooklyn Bar Association, verified December 11th, 1956; (2), with respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions; (3), with respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; (4), with respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in [fol. 22] concert with them, and said order, as amended, having further directed that such inquiry and investigation be conducted by the Honorable George A. Arkwright a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, and the said Justice George A. Arkwright having retired by reason of the age limit, and the Honorable Edward G. Baker, a Justice of the Supreme Court, Second Judicial District, having been designated in place of said Justice George A. Arkwright, and it appearing that the said Honorable Edward G. Baker has taken testimony and filed in this court on June 8th, 1959, an intermediate report based upon said testimony, together with said testimony, which report indicates and advises that disciplinary proceedings be taken against attorney Albert Martin Cohen, and pursuant to Section 90 of the Judiciary Law, it is

ORDERED, that Denis M. Hurley, Esq., an attorney, is hereby designated and directed to institute in this court disciplinary proceedings against attorney Albert Martin Cohen (admitted December 6th, 1922, Second Judicial Department), based on his misconduct as indicated in the intermediate report of Mr. Justice Edward G. Baker filed June 8th, 1959, and as indicated in the evidence and exhibits adduced in said judicial inquiry and investigation, or any other evidence that may be available, and that such dis-

ciplinary proceedings be instituted and prosecuted as soon as may be practicable.

Dated: Kings County, N. Y., June 22, 1959.

GERALD NOLAN
Presiding Justice,
Appellate Division, Supreme Court,
Second Judicial Department.

[fol. 23]

EXHIBIT B, ANNEXED TO PETITION

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of January, 1957.

Present:

HON. GERALD NOLAN,
Presiding Justice,

" HENRY G. WENZEL, JR.,
" GEORGE J. BELDOCK,
" CHARLES E. MURPHY,
" HENRY L. UGHETTA,
Associate Justices.

IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS AT LAW AND BY OTHERS ACTING IN CONCERT WITH THEM IN THE COUNTY OF KINGS.

A petition having been presented to this court by the Brooklyn Bar Association alleging that certain attorneys

and counselors-at-law, and other persons acting in concert with them, are or may be or were or may have been engaged in illegal, corrupt or unethical practices, and in con-[fol. 24] duct prejudicial to the administration of justice, as set forth in said petition, and praying for a judicial inquiry with respect thereto;

NOW, THEREFORE, pursuant to the authority vested in this court by the State Constitution (Art. VI, Sec. 2) and by statute (Judiciary Law, Sections 90, 86), it is hereby:

ORDERED, that a judicial inquiry and investigation be and they hereby are directed to be made:

(1) With respect to the alleged improper practices and abuses by attorneys and counselors-at-law in Kings County, and by persons acting in concert with them, as alleged in said petition;

(2) With respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions;

(3) With respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; and

(4) With respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them; and it is further

ORDERED, that such inquiry and investigation shall be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the at-[fol. 25] tendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and it is further

ORDERED, that, for the purpose of conducting said inquiry and investigation, An Additional Special Term of the Supreme Court, in and for the County of Kings, be and it here-

by is appointed to be held, commencing January 22, 1957, at the Court House in Brooklyn, New York, and that Mr. Justice George A. Arkwright, be and he hereby is assigned to hold such Special Term; and it is further

ORDERED, that Denis M. Hurley, Esq., an attorney and counselor-at-law, of 32 Court Street, Brooklyn, New York who has been duly designated by the Brooklyn Bar Association, be and he hereby is designated to aid the said Justice in the conduct of said inquiry and in the prosecution of said investigation, pursuant to the provisions of the Judiciary Law (Section 90; subdivisions 6 and 7), it is further

ORDERED, that, for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall [fol. 26] be made public or otherwise divulged until the further order of this court; and it is further

ORDERED, that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations.

ENTER:

GERALD NOLAN,
Presiding Justice.

[fol. 27]

EXHIBIT B, ANNEXED TO PETITION

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 11th day of February, 1957.

Present:

HON. GERALD NOLAN,
Presiding Justice,

" HENRY G. WENZEL, JR.,
" GEORGE J. BELIOCK,
" CHARLES E. MURPHY,
" HENRY L. UGHETTA,
Justices.

IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY THE ATTORNEYS AND COUNSELORS AT LAW AND BY OTHERS ACTING IN CONCERT WITH THEM, IN THE COUNTY OF KINGS.

ORDER AMENDING ORDER

On the Court's own motion the order of this court dated and entered January 21st, 1957, is hereby amended by deleting therefrom the third ordering paragraph and substituting therefor the following:

[fol. 28] "ORDERED, that, for the purpose of conducting such inquiry and investigation, An Additional Special Term of the Supreme Court, in and for the County of Kings, be and it hereby is appointed to be held, commencing January 22nd, 1957, at the Court House in Brooklyn, Kings County, New York, or at such other places as the Justice assigned

to preside at such Additional Special Term may deem advisable, and that Mr. Justice George A. Arkwright, be and he hereby is assigned to hold such Additional Special Term, and it is further"

ENTER:

GERALD NOLAN,
Presiding Justice.

[fol. 29]

EXHIBIT C, ANNEXED TO PETITION

Testimony of

ALBERT MARTIN COHEN

before the

ADDITIONAL SPECIAL TERM

on

OCTOBER 28, 1958

Mr. Donlan: Your Honor, the next matter is the matter of Albert Martin Cohen, an attorney with offices at 16 Court Street, Brooklyn, New York. We served a subpoena duces tecum on him and he is represented by David Price, an attorney, who appears for him this afternoon. I believe, although I am not sure, Mr. Cohen is also here.

The Court: All right. We will take that one next.

Mr. Price: I appear for Albert Cohen. I will be outside.

The Court: All right.

ALBERT MARTIN COHEN, 385 East 18th Street, Brooklyn, New York, called as a witness, being first duly sworn, testified as follows:

The Court: Mr. Cohen, you are an attorney-at-law, I know. Were you admitted to practice in this Department?

The Witness: Yes, your Honor.

[fol. 30] The Court: When was that?

The Witness: December, 1922.

The Court: I will go through the same procedure with you as I do with every attorney who is called to the stand. This is the Order of January, 1957, instituting this investigation. You may not have seen it. It is a certified copy. If you would like to look it over, take your time. The Ordered part is the important part.

(Witness examines document.)

You will note that the Order sets up an Inquiry and investigation over which I am to preside and Mr. Hurley is counsel, and that it is secret. You will also note that there are no respondents, no defendants, nobody is being called as such or as a prospective defendant or respondent. We allow counsel and you have counsel. He has been here many times so he is familiar with what we do. He is not allowed in the room during the time of the interrogation. He is allowed to stay outside where I believe he is now. If at any time you feel you need to consult with him or if you want to consult with him, let me know and we will suspend and you may go out and consult with him.

The Witness: All right.

The Court: If there is any question you want to ask feel free to do it. Is there anything you want to state or ask about at the present time?

The Witness: No, your Honor.

[fol. 31] The Court: All right, Mr. Donlan.

By Mr. Donlan:

Q. Mr. Cohen, as I understand it, you are here in answer to a subpoena duces tecum which was served on you on the 17th of September, 1958, for the production of your records for the period—I will read it, perhaps, your Honor, and get the record clear.

The Court: All right.

Q. (Continuing) For the production of the following records pertaining to your business as an attorney and the business of the law firm of Cohen & Rothenberg for the period January 1, 1953 through December 31, 1957. It lists the records. Mr. Cohen, have you these records with you today?

The Witness: Upon advice of counsel I respectfully decline to produce such records upon the ground that the production of such books, records, papers, or other data may tend to incriminate or degrade me and/or expose me to a penalty or forfeiture, and on the further ground that the production of said records would be in violation of my constitutional rights and would compel me to be a witness against myself in violation of my constitutional rights, and further would amount to an unlawful search and seizure in violation of my constitutional rights.

Mr. Donlan: Your Honor, at this time I would like [fol. 32] to introduce in evidence the subpoena duces tecum served on Mr. Albert Martin Cohen by William J. Fuhry of this office.

The Court: That is received in evidence, 845.

(Received in evidence and marked Exhibit 845.)

By Mr. Donlan:

Q. Mr. Cohen, are you at the present time in a partnership or agreement of any kind with Mr. Rothenberg?

The Witness: Upon advice of my counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, do you know whether or not Mr. Rothenberg is presently in Brooklyn or in the City of New York?

The Witness: Upon advice of my counsel I respectfully decline to answer the question on the ground that my answer may tend to incriminate or

degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, is it your position that no matter what question I pose to you that you will answer as you have answered these questions, that you will refuse to answer, as you say, substantially on the ground that it may tend to incriminate you?

[fol. 33] The Witness: Well, may I consult my counsel on that question?

The Court: By all means.

The Witness: Will you repeat that again?

Mr. Donlan: I will have the stenographer read it back.

(The last question was read by the reporter.)

The Court: All right, Mr. Cohen. Step out. Take your time.

(Mr. Cohen left the courtroom and later returned.)

The Court: Repeat the question, please, to Mr. Cohen.

(The same question was read to Mr. Cohen.)

The Witness: Your Honor, after consulting with counsel, the question put to me is entirely too broad and I cannot answer it unless specific questions are put to me.

The Court: In other words, I judge from that your answer is no?

The Witness: Well, my answer is, your Honor, that I cannot answer the question because it is too broad.

The Court: It doesn't seem to be broad. It is pretty clear. Read it again.

Mr. Donlan: Your Honor, I can be more specific.

[fol. 34] The Court: All right. Go ahead.

Mr. Donlan: I was just attempting to shorten the process, that is all.

The Court: As I understand it, your question essentially is this: The Fifth Amendment has been pleaded to every question that is asked, and if you

ask any other question will you get the same answer; isn't that the question.

Mr. Donlan: That is what I intended by the question, but it may appear too broad, your Honor.

The Court: That is what I understand. In other words, there is no use keeping you here, Mr. Cohen, for hours when we can shorten it if you are going to make the same answer.

By Mr. Donlan:

Q. Mr. Cohen, have you used laymen in the capacity of so-called public adjusters or 10-percenters in your practice?

The Witness: Upon advice of counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, have you paid laymen who solicited cases for you?

The Witness: Upon advice of my counsel, I respectfully decline to answer the question upon the [fol. 35] ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, do you have control of the records of the law firm of Cohen & Rothenberg?

The Witness: Upon advice of counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, if I direct any further questions to you relative to your practice as an attorney, will you answer any of those questions or will you answer the questions I put to you, as you have answered all the questions so

far put to you refusing to answer and claiming substantially your privilege against self-incrimination?

The Witness: Your Honor, there again I believe the question is too broad for me to be able to answer it in its form.

The Court: All right. Go ahead, Mr. Donlan.

Q. Mr. Cohen, have you paid individuals any money or moneys for sending cases to you while you were practicing law?

The Witness: Upon advice of my counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

[fol. 36] Q. Mr. Cohen, have you given advances to clients in the conduct of your practice as an attorney?

The Witness: Upon advice of my counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Q. Mr. Cohen, have you in the conduct of your practice as an attorney referred or sent clients to doctors?

The Witness: Upon advice of my counsel, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me and may tend to expose me to a penalty or forfeiture.

Mr. Donlan: In view of the fact that the witness has responded substantially that he refuses to answer on the grounds that the questions I put to him so far may tend to incriminate him, I see no point in further questioning this witness at this time, your Honor.

The Court: That is all, Mr. Cohen.

Mr. Donlan: Thank you, Mr. Cohen.

(Witness excused.)

[fol. 37]

EXHIBIT D, ANNEXED TO PETITION

Testimony of

ALBERT MARTIN COHEN

before the

ADDITIONAL SPECIAL TERM

on

MAY 19, 1959

(Albert Martin Cohen and his counsel, David Price, entered the courtroom.)

MOTION TO STRIKE SUBPOENA DUCES TECUM AND DENIAL THEREOF

Mr. Price: May it please your Honor, on behalf of the witness, who was served with a subpoena duces tecum returnable today, I move to vacate the subpoena duces tecum herein on the ground that it is invalid and that it does not meet the statutory requirements of Sections 750 and 753 of the Judiciary law of the State of New York.

2. That the subpoena duces tecum herein is invalid as a matter of law on the ground of the quantity of the matter called for and the period of time referred to herein, and in violation of Article 1, Section 6 of the New York State Constitution, and the Fourth and Fourteenth Amendments to the Constitution of the United States.

3. That the subpoena duces tecum herein is invalid as a matter of law because it may compel the witness to give answers and/or produce records which may tend to incrimi-
[fol. 38] nate or degrade him in violation of Article 1, Section 6, of the New York State Constitution, and the Fourth and Fourteenth Amendments to the Constitution of the United States.

4. That the subpoena duces tecum herein is invalid as a matter of law for failure to particularize the cases con-

cerning which information and/or records of the petitioner are demanded.

5. That the subpoena duces tecum herein is invalid as a matter of law in violation of the constitutional privilege against unreasonable searches and seizures by calling for matters not shown to be relevant to the investigation.

Those are substantially the grounds urged before your Honor on the other matters that are still pending before your Honor.

The Court: Yes.

Mr. Castaldi: As Mr. Price concluded, the grounds that he has now urged to vacate the instant subpoenas are the grounds similarly urged upon your Honor to vacate subpoenas in other proceedings.

I think the law has at least up to this moment been definitely established by our State Courts, and more particularly in proceedings involving Anonymous No. 2 and Anonymous No. 14, reference to those proceedings having been made during the course of prior proceedings at which Mr. Price was present.

The Court: You are familiar with the form of subpoenas in Anonymous Nos. 2 and 14, are you not?

Mr. Price: Yes, your Honor, I am.

[fol. 39] The Court: My recollection is that they are practically identical in form with that which was served in this instance. Am I not right?

Mr. Price: While I haven't compared them, from a quick, casual look, it is my conclusion that your Honor is correct.

Mr. Castaldi: Without seeking to labor the point, your Honor, if anything the scope and definiteness of these subpoenas are more circumscribed, if I may put it that way, and more pinpointed than even the other subpoenas which have been upheld, in that they relate to a specific period, January 1, 1954 through 1958, and with relation in particular to statements of retainer filed with the Appellate Division in compliance with Rule 3 of the Rules of the Appellate Division by Albert Martin Cohen or the firm of Cohen & Rothenberg, of which Mr. Cohen is a partner.

The Court: I see. Do you have a copy of the subpoena duces tecum?

Mr. Castaldi: Yes, I do, sir. I have the originals, your Honor. Those are photostats. (Handed the Court.)

The Court: These clearly are limited and certainly are less general in form than those with which the Court was concerned in Anonymous 2 and Anonymous 14. It is clear that these relate only to the business records, the records kept by Mr. Cohen in the course of his business, pertaining to any action, claim for damages, and so forth. No, I am prepared to rule now on that. I will deny it with an appropriate exception.

Mr. Price: Yes, your Honor. May I state off the record, please—

(Discussion off the record.)

[fol. 40] ALBERT MARTIN COHEN, recalled as a witness, having been previously sworn, testified further as follows:

Mr. Castaldi: I take it it will be conceded—it might not be entirely necessary—that on the prior occasion that you were sworn, it carries and has the same effect.

Mr. Price: There is no doubt about it, in my opinion.

Mr. Castaldi: I do not know the particular status of the proceeding, as far as his last appearance is concerned, and that was in October, 1958. I wanted, in any event, to make certain that we are in accord that the witness is being deemed to be under oath today and sworn.

Mr. Price: That is correct.

The Court: Surely.

Mr. Castaldi: Mr. Cohen, you are here pursuant to a personal subpoena dated May 11, 1959, and served upon you the same day, May 11, 1959, together with a subpoena duces tecum similarly dated May 11, 1959 and served upon you May 11, 1959.

For the purpose of the record I should like to offer in evidence both of these subpoenas.

Mr. Price: No objection. I concede it, your Honor, that they were both served on him. I don't see any

purpose in offering them other than that. If he wants them I have no objection.

Mr. Castaldi: Yes, I should like to make them part of the record.

[fol. 41] (Received in evidence and marked Exhibits 1188 and 1189, respectively.)

Mr. Castaldi: To save time, Mr. Cohen, I show you this copy of a letter dated May 12, 1959, addressed to your attorney, Mr. Price, from me, and ask—

Mr. Price: Let me see it. I will give you an answer. (Handed counsel.) I received that and received the enclosures.

Mr. Castaldi: Similarly, I should like to ask—

Mr. Price: And he received the enclosures therein mentioned.

Mr. Castaldi: And the copy of that letter?

Mr. Price: Yes.

Mr. Castaldi: May I have the letter marked in evidence, please?

(Received in evidence and marked Exhibit 1190.)

Mr. Castaldi: Mr. Cohen, I think you are entitled to know why you have been subpoenaed to appear here today. With my letter of May 12, 1959, which has just been received in evidence as Exhibit 1190, there was enclosed a copy of the Order of the Appellate Division of January 21, 1957, together with the Order of the so-called Amending Order dated or made February 11, 1957. You have had an opportunity, I assume, to read, study, the provisions of that Order.

The Witness: I read it.

[fol. 42] Mr. Castaldi: And more particularly I want to point out, Mr. Cohen, the provisions of that Appellate Division Order of January 21, 1957, whereby there was ordered this Judicial Inquiry and investigation to be made with respect to alleged improper practices and abuses by attorneys in Kings County and by persons acting in concert with them.

I am referring now to the provision marked in parenthesis No. 1, and followed by provision No. 2

with respect to alleged corrupt and unethical practices, including the practice of solicitation, in obtaining retainers and in the subsequent prosecution and disposition of the claims and actions with respect to practices involving professional misconduct and with respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them.

I do not here charge you—I say I; you will forgive the personal pronoun—with any of the practices enumerated in the Order. I am merely reciting them to indicate to you the scope of this Judicial Inquiry and investigation.

Then you will note also, Mr. Cohen, that the Additional Special Term now represented by his Honor, Judge Baker, is to make and file with the Appellate Division his report setting forth the proceedings before him, together with his findings and his recommendations.

That, in brief, is the essence of this Order, which I mentioned to indicate, as I say, the basis and scope of the inquiry.

[fol. 43] Mr. Price: We will concede that my client is more or less, as are all lawyers, in duty bound to know the scope of the Inquiry ordered by the Appellate Division, and I so concede it.

Mr. Castaldi: Thank you, sir.

Perhaps it would be well, by way of preliminary, Mr. Cohen, to questions that I shall put to you shortly, to point out, and as your attorney undoubtedly also knows and has probably advised you, that this Inquiry is not an adversary proceeding. You are not a defendant or a respondent in any sense at this time. You are not now being charged with anything, as I said a moment ago, in the Inquiry at this time, and the Inquiry at this juncture seeks merely to ascertain pertinent facts from you that are within the scope of the Inquiry that bear on or relate to your professional conduct. And very frankly, we have information that indicates your participation in professional misconduct, and I want

to afford you the opportunity today to make such answers to questions that I may put to you. If you and your counsel are satisfied that these questions that I shall put to you are relevant and pertinent to the Inquiry, and do bear upon your professional conduct, it is in that light that I am going to propound various questions to you.

You are represented here by able counsel, Mr. Price. It is the policy, if I may presume at the moment to speak for his Honor, Judge Baker, to afford you the privilege of counsel. I do not believe the con- [fol. 44] stitutional law grants you that as a matter of right, but in keeping with Judge Baker's policy, you are permitted to have counsel present.

I want you to feel completely free to confer at any stage of this interrogation with Mr. Price for such advice as you may wish to obtain from him, and similarly, Mr. Price, I don't want you to hesitate, if you feel at any appropriate time you ought to consult with your client on matters of law or constitutional questions, if any arise, without, of course, interrupting the interrogation proper, I want you, in turn, to feel completely free to confer with your client.

Mr. Price: I might say Judge Baker has very kindly advised me of my rights when I first appeared here with another lawyer, so I think I understand, and I think he understands my position.

The Court: Right.

Mr. Castaldi: Thank you. I suffer from lack of lengthy association with the Inquiry, Mr. Price.

Is there any question, Mr. Cohen, that you should like to ask, or any statement you would like to make before proceeding with my questioning?

The Witness: I have no statement to make.

Mr. Castaldi: If the Court please, for purposes of record and again as a basis for some of the questions to follow, I should like to have marked for purposes of reference and deemed part of the record various statements of retainer filed, first in behalf of or by [fol. 45] Mr. Cohen in compliance with Rule 3 of the Special Rules of the Appellate Division, and first

the statements of retainer for the year 1954 thus filed in compliance with Rule 3 with the Appellate Division, Second Department, by or on behalf of Mr. Cohen, and my arithmetical count for such retainers for the year 1954 is thirty-six, although I want to point this out: By some circumstance we have only the retainers Nos. 20 to 36. The first 19 retainers are missing. I think that some time ago they were utilized in or by some other forum, and at the moment they are not available in the Appellate Division. I just wanted to make that explanation. But I shall seek to be careful and not ask any questions with relation to the missing, so-called missing retainers Nos. 1 to 19 for the year 1954.

(Received in evidence and marked Exhibit 1191.)

Mr. Castaldi: Similarly for the purposes of reference and to be deemed part of the record, I want to offer and have marked the original retainers or statements as to retainers in compliance with the same Rule 3 filed with the Appellate Division by or on behalf of Albert Martin Cohen for the calendar year 1955, numbered 1 to 56, inclusive, and therefore aggregating 56 retainers for the year 1955.

(Received in evidence and marked Exhibit 1192.)

[fol. 46] Mr. Castaldi: I next offer the original retainers filed with the Appellate Division, Second Department, in compliance with the same Rule 3 during the calendar year 1956, statements as to retainers Nos. 1 to 53, aggregating 53 retainers filed by or on behalf of Mr. Cohen.

(Received in evidence and marked Exhibit 1193.)

Mr. Castaldi: Next, your Honor, statements as to retainers filed with the Appellate Division, Second Department, by or on behalf of Mr. Cohen, during the calendar year 1957, marked Nos. 1 to 49, inclusive, aggregating 49 original statements of retainer.

(Received in evidence and marked Exhibit 1194.)

Mr. Castaldi: For the calendar year, or during the calendar year 1958, there were filed by or on behalf of Mr. Cohen original statements of retainer with the Appellate Division, Second Department, numbered 1 to 34, inclusive. I ask that these original statements be received.

(Received in evidence and marked Exhibit 1195.)

Mr. Castaldi: Your Honor, next I offer in evidence to be marked for purposes of reference and part of [fol. 47] this record original statements as to retainers filed with the Appellate Division during the calendar year 1954, comprising 33 such statements and numbered 1 to 33, inclusive, filed by or on behalf of Albert Martin Cohen and Louis I. Rothenberg, attorneys, 16 Court Street.

(Received in evidence and marked Exhibit 1196.)

Mr. Castaldi: With respect to the same attorneys, Albert Martin Cohen and Louis I. Rothenberg, attorneys, 16 Court Street, I now offer the original statements of retainer filed with the Appellate Division, Second Department, during the calendar year 1956, numbered 1 to 43, inclusive.

(Received in evidence and marked Exhibit 1197.)

Mr. Castaldi: Your Honor, I might make the observation that all of these statements of retainer are in conformity, timewise, with the period specified in the subpoenas that were introduced in evidence today, served upon Mr. Cohen.

By Mr. Castaldi:

Q. Mr. Cohen, from the testimony that you previously gave before this Additional Special Term on October 28, 1958, I note that you were admitted to the practice of law in the Second Judicial Department in December, 1922. Is that correct, sir? A. That is correct.

[fol. 48] Q. Do you now maintain an office for the practice of law? A. I do.

Q. Where, please? A. 16 Court Street, Brooklyn.

Q. How long have you maintained an office at that address? A. It is a long time. I am trying to remember.

Q. Well, approximately. I am not going to ask you to be precise on questions of that kind. A. About—over fifteen years.

Q. Approximately fifteen years? A. I think it is more.

Q. All right. Have you maintained during that time an office at any other address than 16 Court Street? A. At 26 Court Street.

Q. I mean during this period. A. No.

Q. Only at that address? A. That is right.

Q. During that period of time have you practiced law individually or at any time did you practice in association with or in partnership with any other lawyer, or lawyers?

The Witness: May I consult with Mr. Price?

The Court: Of course.

Mr. Price: Assert your privilege. It is my advice to you to assert your constitutional privilege.

The Court: You may consult with Mr. Price at any time during the questioning, in private or otherwise.

The Witness: Thank you.

The Court: Surely.

Mr. Price: I think, in order to expedite it, that I might indicate to him what I desire him to do. I just did.

[fol. 49] The Court: All right.

The Witness: I don't understand you.

Mr. Price: Assert your constitutional privilege.

The Witness: Acting upon the advice of my counsel, your Honor, I respectfully decline to answer the question upon the ground that my answer may tend to incriminate or degrade me, and may tend to expose me to a penalty or forfeiture, and I rely on the privileges accorded to me under the New York State and Federal Constitutions.

By Mr. Castaldi:

Q. Mr. Cohen, how many employees do you have in your law office at this time?

Mr. Price: The same.

The Witness: Well, upon the advice of my counsel, your Honor, I respectfully decline to answer any questions, answer this question, upon the ground—

Mr. Price: You may say on the same ground.

The Court: Yes, I was going to suggest, too, that perhaps we can shorten the answer.

The Witness: Upon the same ground as I previously indicated.

Mr. Castaldi: It being understood that thereby the answer that you initially gave, whereby you invoked your constitutional privilege, shall be deemed to apply with the same scope, force and effect, then? [fol. 50] Mr. Price: Yes.

Mr. Castaldi: To such questions as you may assert or invoke your privileges, is that correct?

Mr. Price: That is correct.

By Mr. Castaldi:

Q. During the last ten years have you practiced law in association—I think I may have asked you this, but I will make it more specifically—Mr. Cohen, during the last ten years have you at any time during that period practiced law in association with or in partnership with one Louis Rothenberg at 16 Court Street, Brooklyn?

The Witness: My answer is the same as the answers to the previous questions, your Honor, on the advice of counsel.

Mr. Castaldi: There again, so that there will be no chance for any misunderstanding, it is with respect to his invoking his constitutional privilege that he first gave?

Mr. Price: That is right.

The Court: In the event the answer is the same to any questions that may follow, it is understood that

the answer will be identical in form to the answer given to the first question propounded to the witness.

Mr. Price: Wherein he invoked his constitutional privileges under the Constitution of the State of New York and under the Federal Constitution and the amendments thereto, without specifically pointing them out.

The Court: Yes.

[fol. 51] Mr. Price: That is correct, sir.

Mr. Castaldi: No, I take issue a little bit. You say "without pointing them out." I do insist sir, most respectfully, that you do point out which privileges of the Constitution you rely upon. Is it the privilege tending to incriminate?

Mr. Price: Section 6, Article 1 of the New York State Constitution, and I think it is the Fifth Article of Amendment to the Constitution of the United States and the Fourteenth Article of Amendment to the Constitution of the United States.

Mr. Castaldi: And Mr. Cohen adopts those particular provisions of the State and Federal Constitutions?

Mr. Price: That is correct, sir.

The Court: I think the record is clear.

Mr. Castaldi: Yes.

Br. Mr. Castaldi:

Q. Mr. Cohen, is not the name of Louis I. Rothenberg now on the entrance door to your offices at 16 Court Street, Brooklyn?

Mr. Price: Same answer.

The Witness: My answer is the same as I have previously indicated, your Honor.

Mr. Price: And I might state to your Honor, it is counsel's view that the United States Supreme Court in a rather recent decision says that we must claim our privilege all the way, otherwise we waive it if we answer any questions, and with that in view he is taking my advice.

[fol. 52] Mr. Castaldi: Similarly, I feel duty bound as an attorney to propound a series of these questions, even though there is indication that the client may invoke the privilege,

Mr. Price: Yes, you do anything you want to. I sha'n't do anything to impede you if I can help it.

By Mr. Castaldi:

Q. Mr. Cohen, I refer you to the subpoena duces tecum marked in evidence today as Exhibit 1189 and ask you, sir, if you have produced the particular records called for by that subpoena duces tecum?

Mr. Price: Invoke your constitutional right.

The Witness: Well, acting upon the advice of my counsel, your Honor, I respectfully decline to produce any of these records, upon the ground that the production of any books, records, papers, or any other data may tend to incriminate or degrade me and/or expose me to penalty or forfeiture, and on the further ground that the production of said records would be in violation of my constitutional rights and would compel me to be a witness against myself in violation of my constitutional rights, and further would amount to an unlawful search and seizure in violation of my constitutional rights. And I also decline upon all of the grounds stated by my counsel on his motion to vacate the subpoena duces tecum. And again I [fol. 53] rely upon the privileges accorded to me under the New York State and Federal Constitutions, and the particular sections and amendments thereof as stated by my counsel.

Mr. Castaldi: Your Honor, among the grounds asserted by the witness in his answer was that of unlawful search and seizure. So that we can define the precise issues here, do I understand from your Honor's ruling at the outset of this hearing today on the motion made by Mr. Price to vacate the subpoenas, wherein he asserted unlawful search and seizure, that that ground is overruled by your Honor?

The Court: Correct.

By Mr. Castaldi:

Q. Mr. Cohen, do you have custody or possession of the records of those cases reflected in the statements of retainer that you filed with the Appellate Division for the years 1954 to 1958, inclusive, which were offered in evidence today?

Mr. Price: The same position.

The Witness: My answer is the same as I have previously indicated, if your Honor please.

Q. Do you have custody or possession of the records of the law firm of Cohen & Rothenberg for such statements of retainer that were filed during that period of 1954 through 1958?

The Witness: My answer is the same as previously indicated.

[fol. 54] Q. In connection with your law practice, and more particularly confined to the period of 1954 through 1958, would you state, please, if you maintained a bank account in your individual name, for your law practice, and in what bank was your account so maintained?

Mr. Price: Same answer.

The Witness: My answer is the same as previously indicated, your Honor.

Mr. Price: Just say same answer. Shorten it, please.

Q. Would you state, please, if a bank account was maintained during the period 1954 to 1958 for the law practice or affecting the law practice of Cohen & Rothenberg, and, if so, in what bank was such firm account maintained?

The Witness: Same answer.

Q. Were any records affecting your law practice, and more particularly affecting the cases that are indicated in the statements of retainer for the period 1954 through 1958—have any such records been destroyed?

The Witness: Same answer.

Q. With respect to comparable records with respect to the law firm of Cohen & Rothenberg for the same period of 1954 to 1958, have any such records been destroyed?

The Witness: Same answer, your Honor.

[fol. 55] Q. In this connection I assume Mr. Cohen, you are mindful that Rule 5 of the Special Rules of the Appellate Division requires an attorney to preserve all papers for a period of at least five years after the disposition of a contingent fee claim for a case for which you have filed a statement of retainer. Are you familiar with that rule, sir?

Mr. Price: I submit, your Honor, it is immaterial whether he is familiar with it or not. We are all charged with it, whether we are familiar or not.

Mr. Castaldi: I think scienter may be important.

The Court: It may be. I think it is a proper question.

Mr. Price: Then give your answer, if you are familiar with the rule.

A. I know that to be so.

Q. Frankly, it was in the light of that rule, Mr. Cohen, that I asked you whether the records in question were in your custody or possession or have been destroyed?

Mr. Price: Same answer.

The Witness: Well, he hasn't asked me a question. He just made a statement.

Q. In the light of that specific provision or requirement in Rule 5, is your answer to the previous questions regarding the existence or destruction of any records, without my charging you with destruction of the records, sir, by those questions, is your answer the same? A. I don't quite [fol. 56] get the question. Would you mind repeating it? It is a very lengthy question.

Q. In the light of my specific reference, sir, to the requirements of Rule 5 of the Special Rules of the Appellate Division— A. Now I have it. You don't have to repeat it.

Q. All right, sir.

The Witness: My answer, your Honor, if I may consult with Mr. Price a moment—

Mr. Price: The same answer.
The Witness: Well, may I consult you?
The Court: Certainly.
Mr. Price: Surely.

(The witness consulted counsel off the record.)

The Witness: Your Honor, I did not give the previous answer in the light of this particular rule.
The Court: I am not sure that I understand that.
The Witness: I am trying to make myself clear.

By Mr. Castaldi:

Q. I am not contending that you did, sir. A. All right.
Q. I am not contending that you did. I am asking you, however— A. I am glad you said that, Mr. Castaldi.
Q. I am asking you, however, Mr. Cohen—and by the way, if any question any time is not clear to you, please feel free to so indicate to me. A. I have asked witnesses [fol. 57] that time and again, Mr. Castaldi.
Q. Mr. Cohen, I ask you now, in the light of my making known to you the particular requirements or provisions of Rule 5 of the Special Rules of the Appellate Division, with which you stated you are familiar, is your answer still the same with respect to the retention of the records pertaining to your individual law practice for the year 1954 to 1958, inclusive?

The Witness: Your Honor, I don't have to consult my counsel on this. I have been a lawyer long enough. With all due respect to Mr. Castaldi, I don't think it is a fair question, because you are tying it up with the rule that I am familiar with, and I am glad to hear you say you don't accuse me of destroying records.
Mr. Castaldi: No, I do not.
The Witness: But I can't answer your question, because you are asking me in the light of that rule what is my answer to the question? It isn't a question of that rule, your Honor.
The Court: I think it is much simpler than you make it. In effect, counsel called your attention to the rule, with which you said you were familiar.
The Witness: Yes.

The Court: Go back to the original question. The question simply is, have you destroyed any records? That is all.

Mr. Castaldi: I accept his Honor's suggestion. That is all I ask you now.

The Court: Do you still retain—

[fol. 58] Mr. Price: I told you not to answer. You said you wanted to answer, so go ahead and answer.

The Witness: I have to take my counsel's advice. If I answer it, you said it may be deemed a waiver.

Mr. Price: That is why I said make the same answer.

The Witness: Well, then, specifically upon my counsel's advice, the answer is the same.

The Court: All right.

By Mr. Castaldi:

Q. Mr. Cohen, during the period of the last five years, and gearing my question to the period 1954 to 1958, inclusive, have you failed or omitted to file a statement of retainer in any personal injury case involving a claimant or client for whom you acted as the attorney on a contingent-fee basis?

The Witness: I will have to ask my attorney about this.

The Court: All right.

The Witness: I would like to answer that.

(The witness consulted counsel off the record.)

A. As far as I know, Mr. Castaldi, any case in which I was retained by a client, or by an attorney, I filed a statement of retainer. And, as a matter of fact, in any case in which I filed statements of retainer I did not wait for the statutory [fol. 59] period, I filed them as soon as I was retained, as a rule.

Q. I appreciate your positive statement, sir. With respect to the statements of retainer that have been received in evidence earlier, did you ever employ an agent or a so-called runner to secure any of those claimants as your clients whose names are indicated in the statements of retainer?

The Witness: May I see Mr. Price a moment?
The Court: Yes.

(The witness consulted counsel off the record.)

The Witness: My answer is the same, on the advice of my counsel.

Q. Mr. Cohen, did you ever pay or reward any member of the Police Department for referring or bringing to your office a claimant for personal injuries?

The Witness: Upon my counsel's advice, my answer is the same.

Q. Within the last five years, and more particularly during the period of 1954 through 1958, did you pay or agree to pay any member of the Police Department for referring or bringing to your office any of the claimants whose names are reflected in the statements of retainer filed for the same period?

[fol. 60] The Witness: Well, your Honor, I haven't seen the statements of retainer, but my answer is the same.

Q. Lest there be any question as to opportunity to look over the statements of retainer, Mr. Cohen, I want to give you full opportunity to examine anything that you wish that is referred to here and made part of this record. In other words, I do not want, frankly, a qualified answer, and if you want that opportunity, I shall cooperate.

The Witness: No, my answer is the same as indicated, upon my attorney's advice.

Q. For the same period during 1954 through 1958, did you ever pay or reward any court or prison employee for referring or bringing to your office a personal injury case?

Mr. Price: The same answer.

The Witness: The same answer, upon my attorney's advice.

Mr. Price: Just say, "Same answer," will you, please?

The Witness: All right.

Q. I shall ask you the same questions with respect to doctors. I take it that the question now is pretty clear in your mind?

The Witness: Same answer.

Q. How about employees of any insurance or casualty companies during that same period, did you ever pay or [fol. 61] agree to pay any such employees for referring or bringing cases to your office involving claims for personal injuries?

Mr. Price: Same answer.
The Witness: Same answer.

Q. A broad question then, sir, to encompass all categories: During that same period did you ever agree to pay, and did you pay, any layman for referring or bringing personal injury cases to your office?

The Witness: Same answer.

Q. Did you ever make any cash advances to any lay person as an inducement to refer personal injury cases to your office with a promise that upon any settlement or recovery of any such personal injury case, that lay person would be paid by you an amount equal to 10 per cent of the recovery or settlement?

Mr. Price: Same answer.
The Witness: Same answer.

Q. Mr. Cohen, do you know an Al Frangello?

The Witness: Same answer.

Q. Were any personal injury cases ever referred to you or to your office by an Al Frangello?

The Witness: Same answer, your Honor.

Q. Did you ever make any payments or agree to pay or reward a person named Al Frangello, a layman, for re- [fol. 62] ferring personal injury cases to you, sir?

The Witness: Same answer, your Honor.

Q. Did an Al Frangello ever visit you at your office during the last five years?

The Witness: Same answer.

Q. Do you know one Tom Connolly?

The Witness: Same answer, your Honor.

Q. More specifically. Did a Tom Connolly ever refer any personal injury cases to your office?

The Witness: Same answer, your Honor.

Q. Did you ever make any payments or agree to pay, directly or indirectly, one Tom Connolly as a reward for referring personal injury cases to you, sir?

The Witness: Same answer, your Honor.

Q. I am going to ask you the precise questions with relation to some individuals whose names I shall give to you, and I want to know whether in each instance, Mr. Cohen, your answers will be the same, almost in haec verba, with respect to the questions that I put to you with respect to Al Frangello and Tom Connolly. Are the questions that I asked you with relation to Frangello and Connolly fresh in your mind? A. Yes.

Q. All right. So, deeming then that I have asked you those questions with relation to one Joe Marcus, I would [fol. 63] like to know what your answers would be to those questions if put to you?

The Witness: The same.

Q. With respect to one Albert Gaetani? A. Would you spell that, please?

Q. G-a-e-t-a-n-i, or "e" at the end, I am not certain of the spelling.

Mr. Price: It might even be an "o."

Mr. Castaldi: Could be.

The Witness: Same answer.

Q. And one Abe Kaplan?

The Witness: Same answer.

Q. And one Clifford Bass?

The Witness: Same answer.

Q. And lastly, Antonio Pecorino? A. I didn't get that.

Q. Antonio Pecorino.

The Witness: Same answer.

Q. I don't know whether this designation rings any kind of responsive chord to you, the only appellation I have for the individual is one Smithy, S-m-i-t-h-y, or Smitty, S-m-i-t-t-y.

The Witness: Same answer.

Q. Do you know the place of employment of Clifford Bass whom I referred to a moment ago?

[fol. 64] The Witness: Same answer.

Q. Would this refresh your recollection, and what would your answer be as to whether he was employed in one of our City hospitals?

The Witness: Same answer.

Q. Have you had any conversations, either in your office or out of your office, with this Clifford Bass, regarding personal injury cases, not involving Clifford Bass?

The Witness: Same answer.

Q. Did you ever have occasion to draw your individual check from your law office account, but in your individual name, to represent, or the proceeds of which went to any of the individuals whose names I have just mentioned as part of a reward or payment for referring a personal injury case to your office?

The Witness: Same answer, your Honor.

Q. Would your answer be the same with respect to any checks that may have been drawn on the firm account or partnership account, if one there be, of Cohen & Rothenberg, involving any of these individuals?

The Witness: Same answer.

Q. More specifically, were any checks, either your individual account or the firm account of Cohen & Rothenberg, marked "Disb" as the abbreviation for disbursement, the [fol. 65] proceeds of such checks having been received by

these individuals and charged as a disbursement against the particular cases referred by these individuals?

The Witness: Same answer.

Q. Mr. Cohen, did you ever engage the services of so-called claims adjusters, non-lawyers, to settle any of your personal injury cases with insurance companies and casualty companies?

The Witness: Same answer.

Q. More particuarly with respect to the very claims or cases identified by the names of the clients reflected in the statements of retainer received in evidence here today, did you ever engage the services of an adjuster or a so-called ten percenter to settle any of those particular cases with insurance companies or casualty companies?

The Witness: The same answer, your Honor.

Q. Did you ever make any payments to any so-called adjusters or ten percenters for effecting any settlement or disposition of a personal injury case?

The Witness: Same answer.

Q. My first question was with respect to your engaging their services. I just want to point out that this immediate question is with respect to the particular act of your making payment to any such adjusters.

The Witness: Same answer.

[fol. 66] Q. Mr. Cohen, I preface this question again by saying that if you wish to refer to the statements of retainer that were received in evidence today, I would be glad to give you the opportunity to do so. I want to ask you with relation to those statements of retainer, have you in each instance truthfully set forth the names or identity of the so-called referrers of the particular cases indicated in the statements of retainer?

The Witness: Same answer.

Q. Mr. Cohen, after I have showed this photostat of statement of retainer to Mr. Price, I want to ask you cer-

tain questions. I am referring to a statement of retainer No. 41, which is part of Exhibit 1192, being the statements of retainer filed during the calendar year 1955 by you or on your behalf. (Handed the witness.) Would you just take a moment, please, to read that photostat. (Witness examines document.) A. Yes, I have looked at it.

Q. You observed, I take it, Mr. Cohen, that the date of agreement as to the retainer in this particular statement is September 14, 1955, and the client's name is Patrick McCormack, and item 10, as to the referrer, "The client was recommended by Louis 1. Rothenberg, who is personally known to the plaintiff." Mindful of the date, September 14, 1955, as being the date of agreement as to the retainer, would you state, please, if Mr. Rothenberg was at that time associated with you in the practice of law?

The Witness: Same answer.

[fol. 67] Q. Where was Mr. Rothenberg on September 14, 1955?

The Witness: May I just see Mr. Price a moment?
The Court: Of course.

(The witness consulted counsel off the record.)

The Witness: Same answer.

Q. Was Mr. Rothenberg not confined to a prison or penitentiary on September 14, 1955?

The Witness: Same answer.

Q. Mr. Cohen, it is a matter of public record, and hence I feel free that I may so state, that Mr. Rothenberg was indicted on July 28, 1954, and I do not impute to you, sir, any guilt by association, my question will become apparent in a moment; On July 28, 1954, there was indicted by the New York County Grand Jury, under indictment No. 2553, for conspiracy and solicitation in violation of Sections 270-A, I believe, and 270-D of the Penal Law, and after a plea of guilty to I believe one count, Mr. Rothenberg was sentenced on June 20, 1955. During 1954 was Mr. Rothenberg associated with you in the practice of law?

The Witness: The same answer.

Q. Did you, sir, know of Mr. Rothenberg's activities in the practice of the law that formed the basis for the indictment that I have just referred to?

[fol. 68] The Witness: The same answer.

Mr. Price: You see, your Honor, if I were here as a lawyer—I know I am here out of courtesy—I would object, because the question is highly improper, so the only way to protect the record, in my judgment, is advise my client to do just what he did.

The Court: All right.

Mr. Castaldi: I try scrupulously to avoid any irrelevant questions, and I have no hesitancy in stating, inasmuch as Mr. Price has just made his observation about irrelevancy, that in asking these questions concerning Mr. Rothenberg, and the particular period of time, sir—you will recall I also asked you whether he was associated with you in the practice of law during 1954—that Canon 29 of the Canons of Ethics provides, in substance, that lawyers should expose without fear or favor, before the proper tribunals, corrupt or dishonest conduct in the profession. They should strive at all times to uphold the honor, to maintain the dignity of the profession, and to improve not only the law but the administration of justice.

That is my comment at this time, but I want to point it out as the reason for my asking these questions about Mr. Rothenberg.

Mr. Price: I still don't see the relevancy of it. You might, but I don't.

By Mr. Castaldi:

Q. Do you recall with respect to this particular occasion involving the client, Patrick McCormack, as to the disposition of that claim or case?

[fol. 69] Mr. Price: The same.

The Witness: Same answer.

Q. Do you recall any payments to Mr. McCormack in connection with the disposition of this case?

Mr. Price: The same.

The Witness: Same answer.

Q. Did Mr. McCormack ever visit you at your office?

Mr. Price: Same answer.

The Witness: Same answer.

Q. Do you know if Louis I. Rothenberg, named as the referrer here with relation to this particular claim, made any advances, either prior to or during the pendency of the claim to Patrick McCormack?

The Witness: Same answer.

Q. Do you recall if the time arose when you made any payments to Patrick McCormack and he advised you to deduct from his share of the recovery an advance of $100 made to him by Louis I. Rothenberg?

The Witness: The same answer.

By Mr. Castaldi:

Q. Did you refer any of your clients, and more particularly those clients identified in the statements of retainers received in evidence today, to any particular doc-[fol. 70] tor or doctors for examination and treatment in connection with their personal injuries?

The Witness: Same answer.

Q. Did you ever pay any doctors' bills for your clients?

The Witness: Same answer.

Q. Mr. Cohen, in compliance with Rule 4 of the Special Rules of the Appellate Division, did you maintain a special bank account separate from your own personal account for the deposit of any moneys resulting from the settlement or disposition of any personal injury cases?

Mr. Price: You might answer that. Pursuant to Rule 4 did you keep a separate bank account?

A. I kept one account which I called a special account. I recall the original rule was enacted and it required the separate deposits of receipts from insurance companies, that I took it up with the clerk in the Appellate Division and I said, "Under this rule I would have to open up a separate account for each case," and he said, "If you have your account, mark it special, and your clients gets your money. Don't worry about it."

So I called it a special account and all my clients got every dollar they were entitled to. I will tell you that, your Honor.

Q. If I understand the purport of your last answer, you did maintain a separate account? A. I have one account, [fol. 71] Mr. Castaldi, it is called "Albert Martin Cohen, Special." That was one account. As I told his Honor, I used that as my complete account.

Q. For your law practice, sir? A. Yes. But I also used it to draw my own personal checks as well, and I had done this after speaking with the clerk of the Appellate Division because, as I said to you, when I read the rule it would seem that I would have to open up a special account each time, and if a check came in and I disbursed, there would be nothing left to the account and I would be charged for it. So rather than do that, I maintained this one account for those purposes.

Q. Where did you maintain the account?

Mr. Price: You may answer.

A. Chemical Bank.

Q. What branch, sir? A. Court Street.

Q. How long have you maintained the account at Court Street? A. For many years. I couldn't tell you exactly, but for many years.

Q. Similarly, with respect to any personal injury cases handled in the firm name of Cohen & Rothenberg, was there a particular account maintained for that purpose or covering the law practice of Cohen & Rothenberg?

The Witness: I will refuse to answer this question upon the grounds previously stated.

Q. You understand, of course, that my question with relation to the bank account of Cohen & Rothenberg is in-

[fol. 72] tended to be precisely the same as the question that I asked of you which you answered with respect to your individual account for your individual law practice. A. Yes, I understand that.

Q. Do you know an attorney, Ralph S. Fitzer who, I believe, is at 26 Court Street?

The Witness: I decline to answer.

Q. Mr. Cohen, in 1955, based upon the statements of retainer marked in evidence today, the name of Ralph S. Fitzer, 26 Court Street, is given as the name of the attorney for ten clients whose names are in the statements of retainer during 1955, and your name, sir, is indicated as being the trial attorney in ten of these personal injury cases during 1955 wherein Ralph S. Fitzer was the attorney. Did Mr. Fitzer perform any legal services in any of these ten cases?

Mr. Price: If you want to answer it, answer it.

The Court: Do you want to confer with counsel on it?

The Witness: Yes.

The Court: Surely.

(Witness confers with his counsel.)

(The question was read.)

The Witness: Would you show me the names of those ten cases, Mr. Castaldi?

Q. Certainly. I can identify each one of them. A. I can say this, Mr. Castaldi, even without looking at the [fol. 73] names. In some of those cases he did perform some service and in some he didn't. In other words, he retained me. They were his clients. He may have in some cases issued a summons without a complaint and brought the case in to me or he may have issued a summons and complaint, or he may have just come in to retain me before instituting the action.

Q. Similarly, in 1956, there were nine such cases from Mr. Fitzer. Would your answer be the same with relation to those nine cases in 1956? A. Yes.

Mr. Castaldi: Your Honor, may I have a moment or two recess?

The Court: Yes.

Mr. Castaldi: Then I should conclude in about ten minutes.

The Court: You and I discussed the question whether the witness should not be advised along certain lines.

Mr. Castaldi: That is precisely what I want to get my papers together on.

The Court: Suppose we recess for a few minutes.

(A brief recess was taken.)

By Mr. Castaldi:

Q. Mr. Cohen, as is your right, and on the advice of your able counsel, Mr. Price, you have invoked your constitutional privileges.

I draw no inferences from your invoking your constitutional privileges. I would feel remiss, however, if I didn't point out what I regard as possible serious consequences [fol. 74] that may flow from your refusal to answer, albeit you invoked your constitutional privileges.

With the indulgence of Mr. Price, and so as to make my position, at least, completely clear, I think in fairness I should point out, and as Mr. Price undoubtedly knows, Subdivision 2 of Section 90 of the Judiciary Law vests the Appellate Division with power and control over attorneys practicing law in this Department and the Appellate Division is authorized to mete out appropriate disciplinary punishment for anyone proved guilty of professional misconduct or any conduct prejudicial to the administration of justice.

I am mindful too, Mr. Cohen, that a person licensed to practice law does not, in my view at least, have an absolute right to practice but rather, as the Courts have said in some of the cases, that the practice of law and membership in the legal profession is burdened with some conditions, and some of those conditions are spelled out for us in the Canons of Ethics, and I assume you are generally familiar with the Canons.

Bearing on my immediate discussion, I want to specifically direct your attention to some of the Canons only because

they encompass matters that are within or contemplated by the very questions that I put to you today.

By way of illustration, Canon 22 of the Canons of Ethics provides in substance that the conduct of the lawyer before the Court and with other lawyers, should be characterized by candor and frankness.

Canon 28 is of particular relevancy to many of the questions that I put to you today in that it provides that it is disreputable to employ agents or runners to seek out per- [fol. 75] sonal injury claims or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to a lawyer's office or to remunerate policemen, court or prison officials, physicians, hospital attaches, or others who may influence the bringing of personal injury cases to a lawyer.

Canon 28 goes on to provide that a duty to the public and to the profession devolves upon every member of the bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

And in a somewhat like vein as to what I have just said is provided in Canon 29 which I read to you in substance, at least, during my questioning, with respect to the McCormack claim and Louis I. Rothenberg.

Canon #34, regarding division of fees, except with a lawyer, is improper.

To supplement the Canons, a more proper term is in harmony with the Canons of Ethics or vice versa, we have several provisions of the penal law of this State. Section 270-A of the Penal Law prohibits any person from soliciting legal business or soliciting a retainer authorizing an attorney to render legal services.

Section 270-C of the Penal Law prohibits any person employed or attached to a hospital, sanitarium, police department, prison or court, to communicate with an attorney or someone on his behalf for the purpose of aiding the attorney in the solicitation of legal business or in the solicitation of a retainer authorizing the attorney to render legal services.

Section 270-D of the Penal Law prohibits an attorney from employing a person to solicit legal business for the

[fol. 76] attorney or to solicit a retainer authorizing the attorney to render legal services.

Lastly, in Section 276 of the Penal Law we have a provision prohibiting so-called fee splitting with any lay person and prohibiting the sharing of any attorney's fees or compensation.

In brief, those are some of the applicable provisions, statute and Canon law that I think might well apply in your particular situation, and I do not presume at all to say that you are, nor do I pass judgment upon your guilt or innocence of any of the acts or actions embraced within the Canons or the Statutes or indeed referred to in the questions that I put to you today, but I do believe that as a member of the legal profession you owe it to the Appellate Division and to this Additional Special Term designated by the Appellate Division, to answer the questions that were put to you today for the purpose of enabling the Additional Special Term to submit the facts, with appropriate recommendation, to the Appellate Division.

The law that may also apply in the situation will not come from me. That you can be, I am confident, adequately advised by your counsel, Mr. Price. It is not my province to make any particular recommendation to his Honor, Judge Baker. That is solely for him to do in the light of the entire record, and for him to make, and exclusively his, to make such recommendation to the Appellate Division, as he may deem appropriate.

My sole purpose, and I emphasize it, as the sole purpose, to take these few minutes, was to point out to you very clearly, and if you have any questions I want you to feel [fol. 77] free to ask me or certainly his Honor, Judge Baker, any questions that might clarify, if there is any clarification needed in your mind, as to the relevancy and the consequences that might flow from your refusal to answer these questions today.

Mr. Price: I don't think my client should answer that.

Mr. Castaldi: I didn't expect an answer except that I wanted him to feel perfectly free to ask any question for clarification or otherwise.

Mr. Price: Superficially, at least, we have gone into this situation and in absolute candor and in fairness to your Honor I might state to your Honor that we understand our position, and that is probably the question that will have to be litigated in the situation, and what we have done we haven't done anything with the idea of hindering the investigation or being discourteous to your Honor.

On the contrary, we don't feel that way about it. We have taken the position because I think that the law is well settled and we have authority for our position.

So that there can be no misunderstanding, Mr. Cohen feels very, very kindly to you, the gentleman who is presiding here, to the Court, to the Appellate Division and even to the Judicial Inquiry, but our position is clear and we think we are right in doing just what we have done.

The Court: I think there is no question but that Mr. Castaldi's view has been clearly stated.

[fol. 78] Mr. Price: I am inclined to agree with you, sir.

The Court: It is his feeling that the witness availing himself of his constitutional privilege with respect to questions which are material and relevant, those which have to do with his practice of the law, that his availing himself of his constitutional privilege may in and of itself be a sufficient basis for a recommendation to the Appellate Division.

Isn't that your position?

Mr. Castaldi: I did not intend to make it so restrictive in that I am mindful that an attorney, like any other citizen, has a right to avail himself of his constitutional privilege. But I do say that under the circumstances of this matter wherein questions asked relate to his fitness and his conduct and it is part of an inquiry designed to help your Honor carry out the mission entrusted to you by the Appellate Division, that he is under a duty to answer, his constitutional privileges notwithstanding, and his fail-

ure to answer, in my view, may well give rise to disciplinary action.

Mr. Price: We don't agree on that. We rely specifically in the matter of Gray and in the matter of Ellis, in 258 Appellate Division, which was reversed by the Court of Appeals, and the Court of Appeals adopted, in my judgment, the language of Judge Lazanski who dissented and held that the attorneys who invoked their constitutional privileges were doing what they had an absolute legal right to do, and [fol. 79] if they had a legal right to do it, they had a moral right to do it, and therefore if they do it, no consequence can come to them for asserting that which the law gives them, in addition to giving it to an ordinary citizen who is not a lawyer.

The Court: I have in mind that the investigatory body in those cases had the right to grant immunity under the statute.

Mr. Price: No, Judge.

The Court: And that the persons under investigation offer to make full disclosure but refused to waive their constitutional privileges. Isn't that the situation in those two cases?

Mr. Price: Your Honor, they were called upon to sign waivers of immunity.

The Court: Which they refused to do.

Mr. Price: Which they refused to do.

The Court: But they offered to make full disclosure.

Mr. Price: May I say this to you, sir, if in that case they came back later, after having refused to testify and after having refused to sign waivers, they came back and they wrote letters to the Judge and to Mr. Kennedy, who was formerly—well, he followed me as a clerk for Judge Steinbrink, that they were willing to testify but not sign waivers of immunity. But while that does appear in the record, that was not the turning point in the case. The Court of Appeals, as I view it, and if I am wrong the Court of Appeals will have to tell me so, and I don't think that I am wrong, Judge Lazanski [fol. 80] clearly and very specifically says that the

invocation or the calling upon your constitutional rights can in no instance be the basis for disciplinary proceedings, and I stand on that statement. That is my position.

Mr. Castaldi: The issue, your Honor, appears to be at least clearly drawn.

Mr. Price: I think so.

Mr. Castaldi: I think Mr. Price has made a very frank statement of his views of the law. I, of course, do not accept those views. I think the philosophy expressed in subsequent and more recent decisions represents the state of the law, which I don't expect Mr. Price to adopt. But overshadowing and perhaps permeating this entire discussion, it seems to me is the requisite on a member of the bar to be at all times candid and display the attitude of candor and frankness and fairness with the Court to aid the supervisory body, the Appellate Division, to determine if the particular lawyer has or has not committed any professional misconduct.

Mr. Price: That will be the ultimate question for the Courts to decide. But I say no Court and no Canon of Ethics can overrule a constitutional provision. The Constitution and its articles of amendment are supreme, and if we have it, we have a right to resort to it. My contention is clear that if we do, we can't be disciplined for doing that which the law says we have a perfect legal and moral right to do.

That is my position.

[fol. 81] Mr. Castaldi: That is the issue.

Mr. Price: All right, sir. I want to say that I am very, very grateful to your Honor for your patience and your kindness and your courtesy, and I am sure my client is. And I am very thankful to you for your kindness and patience, Mr. Castaldi, and you, Mr. Caputo. I think we have all tried to act as lawyers.

The Court: I think, however, before we wind up I should ask the witness this question. In view of the statement which was made by Mr. Castaldi, if the identical questions which have been asked were

again propounded to you, would your answers be the same?

Mr. Price: Yes.

The Witness: Yes.

Mr. Price: Because he is following my advice and my advice would be to have him say that.

The Court: All right.

Mr. Price: I thank you very kindly. My client propounded a question to me, your Honor, that if the Courts ultimately say that he should have answered the questions, will he have that opportunity of coming back later and answering them, if they say he was wrong in following my advice.

The Court: I am not prepared to answer that at this time.

Mr. Castaldi: I would not want to mislead Mr. Cohen. I do believe, however, that it is an incident of a proceeding of this kind, it is a risk that must be weighed and calculated carefully by Mr. Cohen [fol. 82] now and not say, "Well, I will stand by and perhaps I will have another bite of the cherry."

Mr. Price: I know if your Honor had assumed summary jurisdiction and undertook to punish him for contempt for his failure to answer questions after you directed him to, it has always been the method used by the Court in saying, "I will give you a chance to purge yourself,"—

Mr. Castaldi: I would say this—

Mr. Price: If it took that, I have seen that many, many times where witnesses were committed because they declined to do as directed by the Court and then the Court says, "Well, I will give you a chance to purge yourself."

Mr. Castaldi: Your Honor, if I may suggest this, I do believe that we are needlessly inviting difficulty if we seek to project this into the future. We know not what may happen—

Mr. Price: I am inclined to agree with you.

Mr. Castaldi: On your particular request or in question form, as you put it, as to whether Mr. Cohen, if this legal issue be decided adversely to him, we

would have the opportunity to come in to answer the questions, I for one would want to make it perfectly clear that I make no representation nor would I want to be a party to any commitment of any kind at this time.

Mr. Price: I think, your Honor, that that question eventually would have to be answered either by the Appellate Division or the Court of Appeals.

[fol. 83] The Court: I think so.

Mr. Price: After thinking it over, Mr. Cohen just asked me to propound it to your Honor, and I did, but I don't think that it is is up to you or to me, but it will be up to whichever Court acts upon it.

The Court: I think you are right.

Mr. Price: Thank you, sir.

(Witness excused.)

[fol. 84]

IN SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

ANSWER TO PETITION

Answering the petition herein, the respondent respectfully alleges:

First: Admits the allegation contained in Paragraphs "1 to 22" inclusive of the petition.

Second: Denies each and every allegation contained in Paragraph "23" of the petition.

RESPONDENT ALLEGES AFFIRMATIVELY:

That in declining, upon the advice of his counsel, to answer the questions before the Judicial Inquiry and to produce documents pursuant to the subpoenas duces tecum, respondent was motivated solely by a desire to preserve his constitutional right against self-incrimination; that in so doing, respondent was and now is of the bona fide belief that he was within his legal and constitutional rights and moral prerogative in pleading the privilege against self-incrimination guaranteed to all persons, lawyers or laymen

alike, under Article 1 Section 6 of the New York State Constitution; that respondent honestly and sincerely relied upon his understanding and the understanding of his coun- [fol. 85] sel of the decisions of the Court of Appeals (in the cases of Matter of Kaffenburgh, 188 N. Y. 49; Matter of Ellis, 282 N. Y. 435, and Matter of Grae, 282 N. Y. 428); that the imposition of any discipline upon respondent for asserting said privilege against self-incrimination would be a denial to him of due process in violation of his rights under the Constitution of the State of New York and under the 14th Amendment of the Constitution of the United States and would impose upon him an unjust and undue penalty, hardship and forfeiture.

The right to practice law is a right of liberty and property protected by the Fourteenth Amendment to the Constitution of the United States.

Wherefore, respondent respectfully prays that the petition herein be dismissed and for such other and further relief as may be just and equitable in the premises.

(Verified by Albert Martin Cohen on July 31, 1959.)

[fol. 86]

IN SUPREME COURT

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

Nolan, P.J., Wenzel, Beldock, Ughetta and Kleinfeld, JJ.

OPINIONS OF THE COURT

Disciplinary proceedings instituted by Denis M. Hurley pursuant to an order of this court entered June 22, 1959. Respondent was admitted to the Bar December 6, 1922 at a term of the Appellate Division of the Supreme Court in the Second Judicial Department.

Denis M. Hurley for petitioner.

David F. Price for respondent.

Beldock, J.

More than 40 years ago the eminent jurist Chief Judge Cardozo, declared: "Membership in the bar is a privilege

burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards * * *. Whenever the condition is broken, the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy [fol. 87] lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment" (*Matter of Rouss*, 221 N. Y. 81, 84-85).

On the ground that respondent, a member of the Bar since 1922, by his conduct has broken *the condition*; this proceeding is brought to declare that he has lost *the privilege* of membership in the Bar.

The genesis of this proceeding is a judicial inquiry undertaken by direction of this court. Advised by the Brooklyn Bar Association's petition (presented after its own investigation) of serious abuses and unethical practices by attorneys in Kings County with respect to their procurement of negligence cases on a contingent basis and with respect to their prosecution of such cases, this court in the exercise of its inherent and statutory power and duty (N. Y. Const., Art. VI, §2; Judiciary Law, §90; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465), ordered a judicial inquiry. The inquiry was ordered with respect to the alleged illegal, corrupt and unethical practices and with respect to the alleged conduct prejudicial to the administration of justice by attorneys and others acting in concert with them, in Kings County. The purpose of the inquiry is to expose all the evil practices with a view to enabling this court to adopt appropriate measures to eliminate them and to discipline those attorneys found to have engaged in them.

The existing conditions in Kings County as a result of the abuses in the handling of negligence cases by attorneys, [fol. 88] is well portrayed by Chief Judge Cardozo in his summary of the causes leading to the 1928 "ambulance chasing" investigation (*People ex rel. Karlin* v. *Culkin*,

supra, p. 468). Unfortunately, the evils of yesterday have returned to plague us today.

In fairness and in justice to the legal profession, however, we state at the outset that the number of lawyers who appear to be involved in the alleged unethical practices is minute in relation to the total number of honorable practitioners at the Bar in Kings County.

During the period 1954 to 1958 inclusive, pursuant to the rules of this court, the respondent, who apparently specialized in negligence cases, filed 228 statements as to retainer in his own name and 76 such statements in a firm name, thus indicating that he and his firm had been retained on a contingent basis in a total of 304 negligence cases. He was duly subpoenaed to testify and to produce his records with respect to such cases before the Justice designated by this court to conduct this judicial inquiry at an additional Special Term. On the advice of counsel, respondent invoked his constitutional privilege against self incrimination and refused on that ground to answer pertinent questions and to produce his records.

It is not disputed that respondent has asserted his constitutional privilege in good faith. Nor is it disputed that the questions put and the records sought come within the scope of the inquiry and that the information sought to be elicited would be relevant. Indeed, these facts are virtually conceded by the parties to this proceeding.

The petition now presented to the court seeks to discipline respondent, not on the ground that he has asserted his [fol. 89] constitutional privilege, but on the ground that his refusal to answer relevant questions and his refusal to produce relevant records "are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession", in that such refusals (a) are "contrary to the standards of candor and frankness that are required * * * of a lawyer to the Court", (b) are "in defiance of and flaunt [flout] the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer", (c) have "hindered and impeded the Judicial Inquiry" which had been ordered by this court, and (d) have resulted in respondent's withholding "vital

information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession".

Thus, the sole question for our determination is whether the respondent, by reason of his refusal to answer relevant questions and to produce relevant records, may be disciplined as a lawyer, or, stated differently, does his constitutional privilege against self incrimination shield him, not only from possible criminal prosecution, but also from disciplinary action as a member of the Bar for failing in his duties, obligations and responsibilities as a lawyer to the court?

This question goes to the heart of a serious and far-reaching problem confronting the Bar, the courts and the public. When this question is finally resolved it will affect the standing at the Bar, not only of this respondent, but of many other lawyers who similarly have asserted their constitutional privilege against self incrimination as a basis [fol. 90] for refusing to divulge pertinent information with respect to their practices in relation to negligence cases. The resolution of this question will also determine in large measure whether this court's supervisory and regulatory power over lawyers, and whether this court's plenary power to curb all evil and unethical practices in the profession of the law, are to be suppressed and subverted, and whether this court is to be rendered impotent in the performance of its inherent and statutory duties relating to attorneys and to the administration of justice.

In order to keep in proper perspective the precise question to be decided here, it should be emphasized that with respect to the members of the Bar collectively, this court has the positive affirmative duty, springing both from its ancient plenary jurisdiction over attorneys and from the express statutory delegation of such power, "to keep the house of the law in order"; to compel attorneys "to submit to an inquisition as to professional misconduct", to ascertain the existence of practices which are prejudicial to the administration of justice, to compel the discontinuance of such practices and to discipline those attorneys who may have engaged in them. For the achievement of these ends this court is empowered to make any rule, to hold

any inquisition, and to require any attorney to attend and to give evidence under oath. The end and the aim of the inquisition are not punishment, but discipline. And every attorney, as an officer of the court, has the reciprocal duty to aid the court, to co-operate with it, to obey its rules and orders, to respond to all relevant questions put by the court or by the agency conducting the inquiry on its behalf, [fol. 91] and to refrain from doing any act which might thwart the inquiry (Judiciary Law, §90; *Gair* v. *Peck*, 6 N. Y. 2d 97, 111; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470-479, *supra; Matter of Queens County Bar Assn.* v. *Dwyer*, 254 App. Div. 769; *Matter of Cherry*, 228 App. Div. 458, 464-465; *Matter of Brooklyn Bar Assn.*, 223 App. Div. 149, 151-153; *Matter of Bar Assn. of City of New York*, 222 App. Div. 580, 584-587; *Matter of Flannery*, 150 App. Div. 369, 371, affd. 212 N. Y. 610).

And with respect to any particular member of the Bar, whenever the occasion demands or whenever his character and fitness are called into question, this court likewise has the positive affirmative duty to re-examine into them and to ascertain whether he *still possesses* the requisite character and fitness to continue to be a member of the Bar. If it finds that he does not, it must disbar him—not by way of punishment, but "for the protection of both the court and the public * * * from the official ministration of persons unfit to practice." An attorney may continue in the practice of the law only so long as he continues in the possession of the requisite character and fitness (Judiciary Law, §90; *In re Thatcher*, 190 Fed. 969, 975-977; *Matter of Donegan*, 265 App. Div. 774, 787-788; *Matter of Rouss*, 221 N. Y. 81, 84-85, *supra; In re Durant*, 80 Conn. 140, 147).

We disagree with respondent in his contention that the purpose of this proceeding is to discipline him "because he has invoked his constitutional privilege against self-incrimination." Respondent urges, in effect, that his rights as a citizen to be free from punishment for invoking his constitutional privilege are being destroyed if, in his capacity as a lawyer, he may be disciplined for resorting to [fol. 92] such privilege as a citizen. But this argument overlooks the undeniable fact that respondent, with respect to his rights as a citizen and with respect to his obligations as a lawyer, stands in a dual position.

We agree that respondent's rights as a citizen may not be withheld or impaired in a disciplinary proceeding. No person, layman or lawyer, may be compelled to give testimony against himself if, in good faith, he claims that such testimony may tend to incriminate him. Nor may any person, layman or lawyer, be compelled to sign a waiver of immunity from future criminal prosecution. And no inference of guilt or misconduct may be drawn from the exercise of such a constitutional privilege. In any inquiry, investigation, trial or proceeding the respondent has every right to assert his constitutional privilege in response to any question, whether it deals with his professional acts as a lawyer or otherwise. And he cannot be disbarred for his assertion in good faith of his constitutional privilege. These principles have been well established by our highest courts and we abide by them.

However, we are not dealing here with an attempt to force respondent to testify despite his assertion of his constitutional privilege against self incrimination or his refusal to sign a waiver of immunity. This is not a typical "Fifth Amendment" case. No action is sought to be taken against respondent because of his beliefs, his affiliations with subversive groups, or any specific act of doubtful propriety. The judicial inquiry here deals generally and essentially with the procurement and the prosecution of negligence cases, and the questions put to respondent re- [fol. 93] late only to his practices with respect to the 304 statements as to retainer filed by him and his firm and with respect to the negligence cases which they embrace.

Hence, there is involved here only the question of whether respondent in his capacity as a lawyer may be absolved from all his duties, responsibilities and obligations to the Bar and to the court to help expose and uproot evil practices and corruption at the Bar and in the courts with respect to negligence cases. If, as it has been often held, disbarment is not criminal punishment, then by asserting his constitutional privilege against self incrimination and thus gaining immunity from criminal prosecution or *punishment*, is the respondent free to flout and destroy the basic relationship between the lawyer and the court? Can he, with impunity, disregard the canons of ethics and cast

to the winds all inquiries into his professional conduct as a lawyer? Can he disregard his obligation to be frank and candid with the court? Can he negate his duty to cooperate with this court to expose the evil and unethical practices at the Bar and in the courts? Can he refuse to assist this court in its quest to maintain the integrity and morality of the members of the Bar and to maintain the high standards of the legal profession? We say, emphatically no.

This court already has expressed its opinion upon the basic question here posed, namely, whether the attorney's right as a citizen to assert his constitutional privilege against self incrimination, suspends his duty as an attorney and officer of the court to aid the court in its judicial inquiry into unethical practices.

[fol. 94] In 1940, in *Matter of Ellis* (258 App. Div. 558, 565-566) and in *Matter of Grae* (258 App. Div. 576), a majority of this court, after reviewing the authorities, announced this court's view and future policy with respect to attorneys who assert their constitutional privileges as a ground for refusing to divulge pertinent information upon a judicial inquiry. Such view and policy were stated as follows (p. 566): "If an attorney is summoned to assist the court by his testimony at its investigation, instituted to uncover unlawful and unethical practices impairing the due administration of justice, and he refuses to answer the court's questions on the ground that his answers would tend to incriminate or degrade him, or unless he is granted immunity, he is guilty of professional misconduct or conduct prejudicial to the administration of justice and will be disbarred."

In adherence to such policy this court suspended Ellis and Grae from the practice of law. But it did so on two separate and distinct grounds, namely: (1) that their assertion of their constitutional privilege against self incrimination does not excuse their refusal to testify and to divulge pertinent information; and (2) that their insistence upon retaining their constitutional privilege of immunity from prosecution and declining to sign a written waiver of such immunity, impeded the investigation and constituted conduct prejudicial to the administration of justice.

Thereafter, in both the *Ellis* and *Grae* cases, the Court of Appeals reversed the orders of this court (*Matter of Grae*, 282 N. Y. 428; *Matter of Ellis*, 282 N. Y. 435). Such reversal, however, was based solely on the second ground [fol. 95] stated. It was held that the attorneys' refusal to yield their constitutional immunity from criminal prosecution in advance of their testimony and as a condition to permitting them to testify at the judicial inquiry, did not impede the inquiry and is not professional misconduct. This conclusion rested on the express finding of the Court of Appeals that attorneys Grae and Ellis, time and again, had evinced their willingness to co-operate, to testify fully and frankly and to make all their records available if they were not deprived in advance of their constitutional immunity from criminal prosecution by reason of their proffered testimony. The question as to the right of an attorney to refuse to testify in reliance on his constitutional privilege against self incrimination was not reached by the Court of Appeals. Obviously, the consideration of that question became unnecessary because, as stated, both Ellis and Grae were perfectly willing to co-operate with the inquiry and to divulge all relevant information if they had been permitted to retain their constitutional immunity against future criminal prosecution.

Hence, while this court already has taken the unequivocal position that upon a judicial inquiry an attorney, by the assertion of his constitutional privilege against self incrimination cannot avoid his obligation as a member of the Bar and as an officer of the court to divulge all relevant information in his possession, the Court of Appeals has not yet definitively passed upon the precise question.

In the light of the respective duties of court and attorney and in the light of recent decisions, we have now re-examined this court's position as expressed in the *Grae* [fol. 96] and *Ellis* cases (*supra*), insofar as it relates to the effect of an attorney's assertion of his constitutional privilege against self incrimination. After such re-examination we have no hesitancy in affirming such position, limiting it however to the effect of the plea against self incrimination. When so limited, the position of this court is not inconsistent with the position taken by the Court

of Appeals in the *Grae* and *Ellis* cases (*supra*), since, as already stated, in those cases the Court of Appeals held only that a waiver of immunity from future criminal prosecution may not be exacted from an attorney as a condition to permitting him to testify in a judicial inquiry.

The highly responsible, and at the same time delicate, position of the lawyer in our society has been well described by Mr. Justice Frankfurter (*Schware* v. *Board of Bar Examiners of New Mexico*, 353 U. S. 232, 247):

"Certainly since the time of Edward I, through all the vicissitudes of seven centuries of Anglo-American history, the legal profession has played a role all its own. The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' * * * in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those [fol. 97] qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'" Mr. Justice Frankfurter also pointed out (pp. 248-249) that it is this "moral character" which "has been the historic unquestioned prerequisite of fitness" to be a member of the Bar, and that to "a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts".

It is fair to say, in view of the fiduciary responsibility entrusted to the lawyer, that the corruption or deterioration of his moral character, would undermine the administration of justice and thus endanger the security of the State itself. As so aptly said by Chief Justice Charles Evans Hughes, the practice of the profession of the law is "'the privileged administration of a public trust affording the necessary means by which private and public rights are vindicated, private and public wrongs are redressed,

and the very basis of civilization is made secure' " (*Matter of Williams*, 158 F. Supp. 279, 280).

The courts, and the lawyers as integral functionaries and officers of the court, are the foundation upon which the administration of justice must rest. And, it has been oft repeated, the true administration of justice is the firmest pillar of good government. It is for these reasons, as indicated by the cited cases, that the courts from time immemorial have exercised plenary and summary jurisdiction over attorneys, have required them collectively and indi- [fol. 98] vidually to conform to the highest standards of rectitude and have swiftly disciplined them for any departure from such standards.

When the position of any person is one of trust and responsibility, one which directly affects the public interest or the security of the State, and one which consequently requires a high degree of moral character and fitness, such person may be removed from his position if he elects to assert his constitutional privilege against self incrimination as a basis for his refusal to answer relevant questions which seek to determine whether he still possesses such character and fitness. So the courts recently have held as to a teacher, a subway conductor and a policeman (*Beilan v. Board of Educ.*, 357 U. S. 399; *Lerner v. Casey*, 357 U. S. 468, affg. 2 N. Y. 2d 355, affg. 2 A. D. 2d 1 [2d Dept.]; *Matter of Delehanty*, 280 App. Div. 542, affd. 304 N. Y. 725; *Christal v. Police Comm. of San Francisco*, 92 F. 2d 416).

It is true that in the four cases last cited there was a special statute which in effect made compulsory the employee's maintenance of such character and fitness and which permitted his discharge when the administrative agency by which he was employed determined after a hearing that he lacked the requisite character and fitness or that a reasonable doubt exists whether he does. But the principle on which they were all decided is the same, namely: that while the employee is entitled to refuse to answer any relevant question on the ground that his answer might tend to incriminate him, nevertheless, by reason of his refusal to divulge the relevant information sought, the agency was justified in concluding that he lacked the

requisite character and fitness and in removing him from [fol. 99] his position. The rationale is, not that he is being punished for invoking his constitutional privilege, but rather that he is being removed from his position because the agency, by reason of his refusal to furnish the information sought, is entitled to conclude that he no longer possesses the requisite character and fitness to continue in the agency's employ.

Of course, no statute is needed to prescribe the high moral character at all times requisite for the lawyer or to define his obligation to the court or his duty to promote the administration of justice and never to impede it. As indicated by the cited cases, such character, obligation and duty are implicit and fundamental: they have been the prerequisites of the office of an attorney and counselor at law from time immemorial, and without them the true administration of justice could not long survive.

But since the high standard of conduct to which the lawyer must conform is incapable of precise definition the Legislature has wisely confided to this court a plenary power and control over all lawyers (Judiciary Law, §90, subd. 2; *Gair* v. *Peck*, 6 N. Y. 2d 97, *supra*; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, *supra*; *Matter of Brooklyn Bar Assn. of City of New York*, 223 App. Div. 149, *supra*). And, as observed some years ago by the Court of Appeals: "In establishing the standard of conduct to which the bar must at its peril conform, the Appellate Division has a wide discretion, with which we have neither the wish nor the power to interfere" (*Matter of Flannery*, 212 N. Y. 610, 611, *supra*).

Respondent relies on several cases (to wit, *Matter of Grae*, 282 N. Y. 428, *supra*; *Matter of Ellis*, 282 N. Y. 435, [fol. 100] *supra*; *Matter of Kaffenburgh*, 188 N. Y. 49, 52-53; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, *supra*) as upholding the attorney's right to immunity from disbarment by reason of his assertion of his constitutional privilege against self incrimination. In our opinion, none of them so holds, as will be indicated below. Moreover, as already noted, the real question to be determined here is, not whether the attorney is immune from disbarment by reason of his assertion of his constitutional privilege, but

whether the attorney is immune from disbarment by reason of his refusal to co-operate with the court in a judicial inquiry into unethical practices and by reason of his refusal to come forward with an explanation of his conduct when the circumstances require it.

In the *Grae* and *Ellis* cases (*supra*), the Court of Appeals, as previously noted, settled and decided only one proposition, namely, that an attorney who is willing to testify in a judicial inquiry but who is unwilling, in advance of his testimony and as a condition to permitting him to testify, to sign a waiver of immunity from future criminal prosecution, is not subject to discipline by this court by reason of his refusal to sign such waiver. Indeed, this holding is consistent with our own prior holding (cf. *Matter of Solovei*, 250 App. Div. 117, affd. 276 N. Y. 647), as well as with our holding in the instant case.

In the *Kaffenburgh* case (188 N. Y. 49, 52-53, *supra*) the Court of Appeals held only that an attorney could not be disbarred because on the trial of his former employer upon an indictment for conspiracy to defraud, the attorney who had appeared as a witness had invoked his constitutional and statutory privilege against self incrimination [fol. 101] and refused to answer relevant questions. That case did not involve the refusal of an attorney to divulge information upon a judicial inquiry, such as the one here.

In the *Karlin* case (248 N. Y. 465, *supra*), during the course of a judicial inquiry such as the one here, the attorney appeared in court but refused to be sworn or to testify as to his conduct in the procurement of retainers. The Court of Appeals, in an opinion by Cardozo, Ch. J., held that he had been properly held in contempt for his refusal. The only point it decided was that the attorney could not thus defy the inquiry and thwart its purpose by refusing to testify as to what he knows about the evil practices in the profession. Incidentally, the court also indicated that his testimony would be "subject to his claim of privilege if the answer will expose him to punishment for a crime". But the only inference to be drawn from this remark is that if he did testify in the judicial inquiry he could claim his privilege against self incrimination without fear of being held again in contempt and without fear

of future criminal prosecution. The remark had no relation to the question of whether or not the attorney, if he should assert his constitutional privilege in good faith, could thereafter be disciplined or disbarred as an attorney because of his refusal to divulge relevant information sought in the judicial inquiry. That this is so is made quite plain by the sharp distinction which Chief Judge Cardozo himself drew between a criminal and a disciplinary proceeding. He pointed out that:

"The grand jury inquires into crimes with a view to punishment or correction through the sanctions of the crim- [fol. 102] inal law. There are, however, many forms of professional misconduct that do not amount to crimes. Even when they do, disbarment is not punishment within the meaning of the criminal law. * * * *Inquisition by the court with a view to the discipline of its officers is more than a superfluous duplication of inquisition by the grand jury with a view to punishment of criminals. The two fields of action are diverse and independent*". (*People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470 [emphasis supplied]).

This conclusion as to the holding in the *Karlin* case (*supra*) also finds ample support in the opinion of the Court of Appeals in a subsequent case (*Matter of Levy*, 255 N. Y. 223, 225). In the *Levy* case, the Appellate Division in the First Department had disbarred an attorney because it found that upon a judicial inquiry, similar to the one here involved, he had pleaded his constitutional privilege in *bad faith*. The Court of Appeals dismissed the appeal on the ground that the constitutional privilege is not available when it is urged in bad faith and, hence, no question of constitutional construction is properly before the Court of Appeals. It then, apparently, went out of its way, however, to state (p. 255) that it would "pass as unnecessary for consideration at this time the question whether the assertion in good faith [upon a preliminary judicial inquiry] of the privilege against self-incrimination is ground for disbarment."

It will be noted that the *Levy* case was decided two years after the *Karlin* case, that the same judicial inquiry was involved in both cases, that the opinion in the *Levy* case [fol. 103] cites the *Karlin* case, and that, notwithstanding

the *Karlin* case, the Court of Appeals in the *Levy* case clearly indicated that the issue here involved is still an open one and would be decided by the Court of Appeals only when it became necessary to do so and when it is properly presented.

It is also significant that the statutes granting a witness immunity from prosecution or from any penalty or forfeiture when he is compelled to answer despite the assertion of his constitutional privilege against self incrimination, are not deemed to include disbarment. Such immunity statutes do not include disbarment because they are ordinarily "designed to give an immunity as broad as the constitutional privilege, and no broader", because the Constitution provides that no person shall be compelled in any criminal case to be a witness against himself, and because a proceeding looking to disbarment is not a criminal case or a penalty or forfeiture (*Matter of Rouss*, 221 N. Y. 81, 86, *supra; People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470, 475, *supra; Matter of Solovei*, 250 App. Div. 117, 121, affd. 276 N. Y. 647, *supra*).

In view of (a) the high standard of character and morality required of the attorney as a condition both to his admission and *to his retention* in the fellowship of the Bar, (b) the close fiduciary relationship between him and the court, (c) his solemn duty to uphold the integrity of the courts and the Bar and to promote the administration of justice, (d) this court's plenary power and control over him in his capacity as an attorney and counselor at law, (e) the fact that, for good cause shown, this court has initiated a judicial inquiry into unethical practices of attor- [fol. 104] neys in relation primarily to negligence cases, and (f) the fact that in the course of such inquiry it appeared that the respondent and his firm filed a large number of statements as to retainer (an average of more than 60 a year during the five-year period from 1954 to 1958) for such negligence cases, we say that upon interrogation by the court or its agency there is cast upon him as an officer of the court the affirmative duty to come forward with a full and adequate explanation of every such retainer and to thus re-establish his high moral character.

This conclusion also necessarily flows from the fact that to the extent of respondent's examination before this ju-

dicial inquiry, such inquiry inevitably became a preliminary inquiry *pro tanto* into his personal practices for the purpose of determining whether he had engaged in unethical conduct and for the purpose of determining whether he still possessed the high moral character requisite for a member of the Bar.

We repeat: every attorney has an absolute right to assert his constitutional privilege against self incrimination as the basis for his refusal to give any explanation of his conduct or his activities, and when he does so he cannot be compelled to testify. But the moment he asserts his constitutional privilege he creates his own dilemma. Thereupon, after opportunity for reflection (which was here given to the respondent), it is for the attorney to choose whether he will rest upon his constitutional privilege or whether he will discharge his duty to cooperate with the court in its judicial inquiry into unethical practices. If, as here, he deliberately elects not to cooperate with the court, then the court has no alternative but to revoke his privi- [fol. 105] ilege to continue as a member of the Bar. For his duty to the court is inviolable. He cannot remain mute, thereby sterilizing the power of the court and frustrating its inquiry into unethical practices, and yet be permitted to retain his privilege of membership in an honorable profession.

Such membership, it should be emphasized, is a *revocable* privilege. "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice" (Vinson, *Ch. J., In re Isserman*, 345 U. S. 286, 289). We should be ever mindful of the admonition of Mr. Justice Brandeis that "If we desire respect for the law, we must first make the law respectable" (Lief, The Brandeis Guide to the Modern World, p. 166).

To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is, not the fact that respondent has invoked his constitutional privilege against self incrimination, but rather the fact that he has deliberately refused to co-operate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he

had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar.

As Chief Justice Cardozo pointed out in the *Karlin* case (*supra*, p. 473), the court will make "short shrift" of such a lawyer; it will promptly strike his name from the roll of attorneys and deprive him of his privilege to practice. [fol. 106] And, as indicated, such deprivation or such disbarment is not deemed to be punishment, but discipline which the court was always empowered to administer (*People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, *supra*; Judiciary Law, §90, subd. 2).

Respondent should be disbarred and his name should be ordered to be struck from the roll of attorneys, with leave to apply to vacate the order to be entered hereon upon proof that, within 30 days after the entry thereof, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena *duces tecum*.

Wenzel and Ughetta, *JJ.*, concur with Beldock, *J.*

Nolan, *P.J.* (concurring).

If this were a matter of first impression, I would favor a determination in accordance with the views expressed in the dissenting opinion of Presiding Justice Lazansky in *Matter of Ellis* (258 App. Div. 558, 567-575). However, the precise question presented here was decided by this court in that proceeding contrary to the views expressed by the Presiding Justice, and that decision was not affected by the reversal in the Court of Appeals of our determination made at the same time that the failure by the respondent in that proceeding to sign a waiver of immunity constituted professional misconduct. Consequently, I concur in the result.

[fol. 107] Kleinfeld, *J.* (dissenting).

Despite all disclaimers to the contrary, respondent is being disbarred for pleading his privilege against self in-

crimination. The Court of Appeals of this State is committed to the view that this cannot be done and in *Matter of Grae* (282 N. Y. 428, 434-435) stated:

"The privilege against self-incrimination is a constitutional guaranty of a fundamental personal right. Long regarded as a safeguard of civil liberty it was firmly imbedded in the law of England and by the Fifth Amendment to the Federal Constitution became a basic principle of American constitutional law. 'It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the State; and neither legislators nor judges are free to overleap it.' (*Matter of Doyle*, 257 N. Y. 244, 250.) Applying this basic principle to our present problem we have no doubt that when the appellant, as a witness upon the inquiry at the Special Term, declined to sign a waiver of immunity and thus refused to relinquish in advance a privilege which the Constitution guarantees to him, he was within his legal right. As was said by Presiding Justice Lazansky in *Matter of Ellis* (258 App. Div. 558, 572), expressing the minority view at the Appellate Division: 'The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court.'"

In *Matter of Kaffenburgh* (10 N. Y. 49, 53) the Court of Appeals quoted with approval the following language [Vol. 108] from *People ex rel. Taylor* v. *Forbes* (143 N. Y. 219, 228): "no one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained."

If the respondent is guilty of any violation of the laws, rules or regulations appertaining to the conduct of attorneys, and this is proved in an adversary proceeding against him after he has had the right to confront his accusers, cross-examine witnesses, called witnesses on his own behalf, and the benefit of all the other safeguards of due process, then he may be disciplined as the court deems

proper. Absent such proceeding, the respondent has been denied his rights under the Constitutions of this State and of the United States.

The proceeding should be dismissed.

[fol. 109]

IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

STIPULATION WAIVING CERTIFICATION

It Is Hereby Stipulated that the foregoing are true and correct copies of (1) the Notice of Appeal, (2) the Order Appealed From, (3) the Order to Show Cause dated July 13, 1959, and Petition dated July 9, 1959, in support of said Order to Show Cause, together with Exhibits A, B, C and D annexed thereto, (4) Appellant's Answer verified on July 31, 1959, (5) Majority opinion, concurring opinion, and dissenting opinion of the Appellate Division, Second Department, all dated December 31, 1959, all of which are on file in the office of the Clerk of the Appellate Division, Second Department, and it is

Further Stipulated that the exhibits offered and received in evidence during the proceedings in this matter not printed in this record may be produced and used by either of the parties herein on the argument of this appeal or in the briefs submitted thereon with the same force and effect as if printed in the record on appeal, and it is

Further Stipulated that certification by the Clerk of the Appellate Division, Second Department of the foregoing record is hereby waived.

Denis M. Hurley, Attorney Pro se, Respondent.

David F. Price, Attorney for Appellant.

Dated: January 15, 1960.

[fol. 110]

IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION

In the Matter of ALBERT MARTIN COHEN, an attorney, Respondent.

DENIS M. HURLEY, Petitioner.

ORDER ON MOTION FOR A STAY—January 21, 1960

A proceeding having been instituted by Denis M. Hurley, Esq., by petition verified the 9th day of July, 1959, for an order directing that the respondent Albert Martin Cohen (admitted Second Judicial Department on December 6th, 1922), be disciplined upon the charges set forth in said petition, and for such other and further action upon the charges embodied in said petition, as justice may require, and for such other and further relief in the premises as may be just and proper, and the respondent Albert Martin Cohen having filed an answer, herein, and after due deliberation having been had thereon, this court, by order dated and entered December 31st, 1959, having ordered that by reason of the misconduct established by the evidence the said Albert Martin Cohen be disbarred and removed from the office of attorney and counselor at law and that the name of said Albert Martin Cohen be struck from the roll of attorneys of the State of New York, etc., and the said respondent, Albert Martin Cohen, having moved for an order staying the operation of the order of disbarment herein pending the respondent's appeal to the Court of Appeals of the State of New York, and for such other and further relief as to the court may seem just and proper, and the said motion having come on to be heard by an order to show cause, dated January 8th, 1960.

Now on reading and filing said order to show cause, the [fol. 111] affidavit of David F. Price, and the answering affidavit of Denis M. Hurley, and the said motion having been argued by Mr. David F. Price of Counsel for respon-

dent, and argued by Mr. Michael Caputo of Counsel for petitioner, and due deliberation having been had thereon:

It is Ordered that the said motion to stay the operation of the order of disbarment entered December 31, 1959, pending appeal to the Court of Appeals, be and the same hereby is granted on condition that respondent be ready to argue or submit the appeal at the next term of the Court of Appeals, and this court hereby certifies that a constitutional question is directly involved and, therefore no undertaking is required as a condition to the granting of this stay (cf. Civ. Prac. Act, Sections 598-a, 593).

Enter:

John J. Callahan, Clerk.

[fol. 114]

IN THE COURT OF APPEALS OF NEW YORK

In the Matter of ALBERT MARTIN COHEN, an Attorney, Appellant.

DENIS M. HURLEY, Respondent.

OPINION—April 1, 1960

DESMOND, Ch. J. By an order of the Appellate Division, Second Department (one Justice dissenting) petitioner, admitted to the Bar in 1922, has been disbarred from the practice of law. The disbarment order was made after a hearing and on findings that he had refused to answer pertinent questions put to him during a "Judicial Inquiry and Investigation" (Judiciary Law, § 90) ordered by the Appellate Division and held before a Supreme Court Justice assigned by that court. The "Inquiry and Investigation" was concerned with charges of alleged illegal, corrupt and unethical practices and of alleged conduct prejudicial to the administration of justice, by attorneys and others acting with them, in the County of Kings, where appellant had his law office. Appellant's refusal to answer was on the stated ground that the answers might tend to incriminate him. On this appeal he argues that the dis-

barment order was, contrary to law and in violation of his right to due process of law, made solely because of his refusing to answer questions, in good faith reliance on his constitutional privilege (N. Y. Const., art. I, § 6) against self incrimination. The Appellate Division held that he was not disciplined for invoking his constitutional privilege but because, in his capacity and status as a lawyer, he had deliberately breached his inviolable and absolute duty to co-operate with the court in a valid and proper investigation of unethical practices. A lawyer, wrote the Appellate Division, "cannot remain mute, thereby sterilizing the power of the court and frustrating its inquiry into unethical [fol. 115] practices, and yet be permitted to retain his privilege of membership in an honorable profession."

There is no dispute as to the facts and no real dispute as to the legality of this kind of general investigation or "Judicial Inquiry" (Judiciary Law; § 90; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465). On two occasions appellant appeared before the Supreme Court Justice presiding at the inquiry. He was represented by his own counsel. The counsel for the inquiry explained the nature of and authority for the inquiry. Appellant and his attorney were informed by the inquiry's counsel and by the court that this was an investigation and not an adversary proceeding (see *Anonymous* v. *Baker*, 360 U. S. 287, 291; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 479, *supra*), that there were no respondents or defendants, that appellant was "not being charged with anything" but was to be questioned as to pertinent facts "within the scope of the Inquiry" and which were thought to "bear on or relate to your professional conduct", also that counsel for the inquiry had "information that indicates your participation in professional misconduct".

Counsel for the inquiry then put into evidence 228 "Statements of Retainer" which during the years 1954 through 1958 appellant had filed with the Appellate Division in obedience to its Special Rule 3 which requires that an attorney who makes contingent-fee agreements for his services in personal injury, wrongful death, property damage, and certain other kinds of cases, must file such agreements with the court and, if he enters into five or more

such agreements in any year, must give to the court in writing certain particulars as to how he came to be retained. Put into evidence, also, when appellant appeared before the judicial inquiry were 76 other such statements of retainer filed during the same period by the law firm of Cohen & Rothenberg, with which appellant apparently had some association. Counsel for the inquiry informed appellant and the court that all these retainer statements were offered in evidence "as a basis for some of the questions to follow".

Appellant answered a few preliminary questions as to how long and where he had practiced law. About 60 other questions were asked of him during the two days (six months apart) on which he was on the witness stand but, on advice of his counsel who was present in court, he refused to answer any of them (except questions as to whether he had failed in any case to comply with Special Rule 3 and except as to questions about maintaining a separate office bank account) on the ground that answers might tend to incriminate or degrade him or expose him to a penalty or forfeiture. Those unanswered questions related to the identity of his law office partners, associates and employees, to his possession of the records of the [fol. 116] cases described in his statements of retainer, to any destruction of such records, to his bank accounts, to his paying police officers or others for referring claimants to him, to his paying insurance company employees for referring cases to him, and to his promising to pay to any "lay person" 10% of recoveries or settlements. He was asked—and refused to answer—as to whether he had made or agreed to make such payments to any of several named persons, as to whether he had hired or paid non-lawyers to arrange settlements of his cases with insurance companies and as to whether his partner or associate Rothenberg had been indicted for and had pleaded guilty to violations of sections 270-a and 270-d of the Penal Law which forbid the solicitation of legal business or the employment by lawyers of such solicitors. At one stage of this questioning counsel for the inquiry pointedly called to appellant's attention section 90 of the Judiciary Law which gives the Appellate Division's power and control

over lawyers and authority to punish professional misconduct or conduct prejudicial to the administration of justice. At that time the inquiry's counsel cited Canon 22 of Professional Ethics requiring lawyers to be candid and frank when before the court, Canons 28 and 29 forbidding the payment of awards to persons bringing in legal business and requiring lawyers knowing of such practices to inform the court thereof, Canon 34 outlawing division of fees except with other lawyers; also sections 270-a, 270-c, 270-d and 276 of the New York Penal Law, all relating to soliciting and fee splitting. Counsel for the inquiry warned appellant and his counsel that "serious consequences" might flow from his refusal to answer by way of a "recommendation to the Appellate Division." Appellant's counsel replied that he was relying on *Matter of Grae* (282 N. Y. 428) and *Matter of Ellis* (282 N. Y. 435) as holding that there could not be any "consequence" to lawyers for "doing what they had an absolute legal right to do". Appellant was given a further opportunity to answer but persisted in his refusal, all this being admitted in his pleading in this proceeding.

The Supreme Court Justice presiding at the judicial inquiry then filed with the Appellate Division a transcript of the proceedings before him with a recommendation that disciplinary proceedings be instituted against appellant. The Appellate Division directed respondent Hurley, counsel to the inquiry, to commence this disbarment proceeding. Appellant's answer says that there is only an issue as to whether he was within his rights under section 6 of article I of the New York State Constitution, in pleading the privilege. The case, however, is not so simple. Of course, he had the right to assert the privilege and to withhold the criminating answers. That right was his as it would be the right of any citizen and it was not denied to him. He could not be forced to waive his immunity (*Matter of Ellis*, [fol. 117] 282 N. Y. 435, *supra*). But the question still remained as to whether he had broken the "condition" on which depended the "privilege" of membership in the Bar (see Judge CARDOZO in *Matter of Rouss*, 221 N. Y. 81, 84). "Whenever the condition is broken, the privilege is lost" (*Matter of Rouss*, *supra*, pp. 84-85). Appellant as a citizen

could not be denied any of the common right of citizens. But he stood before the inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was "an officer of the court, and like the court itself, an instrument * * * of justice" (Chief Judge CARDOZO in *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470-471, *supra*), with the inevitable consequences that the court which was charged with control and discipline of its officers had its own right to demand his full, honest and loyal co-operation in its investigations and to strike his name from the rolls if he refused to co-operate. Such "co-operation" is a "phrase without reality" as Chief Judge CARDOZO wrote in *People ex rel. Karlin* v. *Culkin* (*supra*, p. 471) if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court.

The solution to our problem is clear when we consider the lawyer's special position. "The court's control over a lawyer's professional life derives from his relationship to * * * the court" (*Theard* v. *United States*, 354 U. S. 278, 281). "Membership in the bar is a privilege burdened with conditions" (*Matter of Rouss*, 221 N. Y. 81, 84, *supra*). Those conditions must not be arbitrary but the proper and appropriate ones are numerous. An attorney's contractual right to collect as fees a percentage of settlements or recoveries may validly be limited by court rule (*Gair* v. *Peck*, 6 N. Y. 2d 97, cert. denied 361 U. S. 374). He may be required to represent, without fee, indigent defendants. He cannot solicit retainers or employ others to solicit them for him, or divide his fees with laymen (Penal Law, §§ 270-a, 270-b, 270-c, 270-d, 276). If he knows of such practices by others, he must inform the court (Canon 29). He must be candid and frank with the court at all times (Canon 22). Not only must he meet educational requirements and prove his character and fitness before being admitted to the Bar but he is subject throughout his professional life to investigation as to whether he continues in the possession of those qualities (Judiciary Law, § 90).

The key word is "duty" and the imposition on a lawyer by tradition and positive law of strict and special duties produces this situation where, at the very time that he is

exercising a common privilege of every citizen in refusing to answer incriminating inquiries, he is failing in his duty as a lawyer and endangering his professional life. Breach of the special duty brings a special penalty. Lawyers are [fol. 118] not the only citizens whose duty to answer is inconsistent with the exercise of the constitutional privilege. So it is with police officers (*Christal* v. *Police Comm.*, 33 Cal. App. 2d 564; *Canteline* v. *McClellan*, 282 N. Y. 166) and with certain other public employees (*Matter of Lerner* v. *Casey*, 2 N. Y. 2d 355, affd. 357 U. S. 468; *Beilan* v. *Board of Educ.*, 357 U. S. 399). The latest in this line of decisions is *Nelson and Globe* v. *County of Los Angeles* (—— U. S. ——, decided February 29, 1960, 28 Law Week 4159). Nelson and Globe had been ordered by their employer, the county, to answer any questions asked of them by a Congressional subcommittee before which they had been subpoenaed. There was a California statute making it the duty of any public employee so subpoenaed to answer any questions as to his membership in any organization advocating the forceful overthrow of the United States Government, etc. Nelson and Globe refused to answer the subcommittee's questions on Fifth Amendment grounds and they were thereupon discharged from their county employment. The United States Supreme Court, following *Beilan* and *Lerner* (*supra*), held that they had been validly separated from their employment not for invoking their constitutional privilege but for insubordination under California law. The majority opinion in the Supreme Court stated that, if these men had simply refused without more to answer the subcommittee's questions, the county could certainly have discharged them and the fact that they chose to place their refusal on a Fifth Amendment claim put the matter in no different posture since their assertion of that claim was not used as a basis for drawing an inference of guilt. In those cited cases the duty to co-operate in investigations by answering relevant questions was found in statutes or constitutions. The lawyer's duty is found elsewhere—in the common law and in the Canons of Ethics—but it is just as plainly written. In this State a lawyer on admission to the Bar takes the same oath as does a public official (see Judiciary Law, § 466).

The idea that invocation of basic constitutional rights may result, for other reasons, in forfeiture of office or privilege is not a new one. Justice HOLMES' aphorism has become famous: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" (*McAuliffe* v. *New Bedford*, 155 Mass. 216, 220). The Federal Hatch Act, denying to governmental employees their right of political activity, on pain of dismissal, has been held valid (*United Public Workers* v. *Mitchell*, 330 U. S. 75).

Appellant's reliance is on *Matter of Grae* (282 N. Y. 428, *supra*); *Matter of Ellis* (282 N. Y. 435, *supra*); *Matter of Solovei* (276 N. Y. 647) and *Matter of Kaffenburgh* (188 N. Y. 49). None of those decisions controls us here. The precise question in *Grae* and *Ellis* (*supra*) was as to whether a lawyer who offered to answer all pertinent [fol. 119] questions could be compelled in such an investigation to waive immunity in advance of questioning. The holding in each case was that a lawyer like every other citizen is constitutionally privileged not to answer damaging questions. The difference between those cases and the present one may seem slight but it is enough to permit a fresh examination (or re-examination) of the question now directly presented. Likewise as to *Kaffenburgh* and *Solovei* (*supra*): Kaffenburgh's refusal to testify was at a criminal trial (so in *Matter of Cohen*, 115 App. Div. 900) and Solovei's was before a grand jury. Our present appellant by declining to answer may have escaped criminal prosecution and punishment, but he could never, while a member of the Bar, escape the other consequences of his flagrant breach of his absolute duty to the court whose officer he was. That breach was in itself "professional delinquency" (*Ex parte Garland*, 71 U. S. 333, 379) and a valid reason for depriving appellant of his office as attorney.

The order appealed from should be affirmed, without costs.

FULD, J. (dissenting). In order to appreciate the force of today's decision, it must be borne in mind that we are concerned not with the necessarily vague contours of the Due

Process Clause of the Federal Constitution, but with the specific provision of the Constitution of this State that no person shall be compelled to be a witness against himself (art. I, § 6). Recent Supreme Court decisions (*Lerner* v. *Casey*, 357 U. S. 468; *Beilan* v. *Board of Educ.*, 357 U. S. 399; and *Nelson and Globe* v. *County of Los Angeles*, decided Feb. 29, 1960, —— U. S. ——), whatever their bearing on the present problem, are, therefore, not dispositive of this case. In other words, whether or not this disbarment violates federal constitutional guarantees—and for reasons previously expressed (e.g., *Matter of Lerner* v. *Casey*, 2 N. Y. 2d 355, 373, dissenting), I believe that it does—we need not resolve the federal question. The case before us may and should be decided, as were *Matter of Grae* (282 N. Y. 428) and *Matter of Ellis* (282 N. Y. 435), on an interpretation of our own Constitution, article I, section 6.

I agree that "strict and special duties" have been imposed on a lawyer (opinion, p. 496). I cannot, however, persuade myself that a lawyer's refusal to answer questions, even before a judicial inquiry, on the constitutionally permissible ground that to do so would incriminate him, may be said to constitute a violation of any such duty. (See *Matter of Grae*, 282 N. Y. 428, *supra*; *Matter of Ellis*, 282 N. Y. 435, *supra*; see, also, *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 471.) In the *Grae* and *Ellis* cases, the court held that under our State Constitution an attorney's refusal to sign a waiver of immunity—his refusal to forego reliance on the privilege—could not constitute a ground for disbarment, even though the refusal occurred during the course of a [fol. 120] judicial inquiry similar to the one which here concerns us.[1] There, too, it was argued that failure to answer was a violation of the lawyer's duty of co-operation

[1] Indeed, in the *Ellis* case (282 N. Y. 435, *supra*), the court pointed out that Ellis, "appearing as a witness at the inquiry, not only declined to sign a waiver of immunity * * * but in addition * * * declined to answer any questions upon the ground that such answers would tend to incriminate or degrade him" (p. 437; see, also, 258 App. Div., at p. 559). Although Ellis later wrote a letter stating that, while he stood upon his refusal to sign a waiver, he was "willing" to answer questions put to him, the significant fact is not only that he never did appear as a witness, but that his refusals to answer questions went unpunished.

with the court. We rejected that argument and, in the words of presiding Justice LAZANSKY who had dissented in the Appellate Division, forthrightly declared that (282 N. Y., at p. 435)

> "'The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court.'"

And, therefore, concluded the court (p. 435),

> "It follows that * * * the present disciplinary proceeding instituted against the appellant, wherein the single offense charged is his refusal to yield a constitutional privilege, is unwarrantable."

The attorneys Grae and Ellis ultimately offered to answer all questions put to them, but, the record makes clear, the offer was based not on a surrender of immunity, but on the specific condition that immunity be granted—by their being compelled to answer questions that might incriminate them. It was for the very reason that the court was unwilling to have immunity conferred on them that it declined to put questions to them without first obtaining a waiver of immunity. Analysis of our opinion, as well as the dissent of Presiding Justice LAZANSKY (258 App. Div., at pp. 567-575)—which this court explicitly approved (282 N. Y., at p. 434)—demonstrates that this court was not merely passing on the consequences of a momentary lapse of courtesy, but was deciding the very point in issue today. Pointedly noting that "the single offense charged [against Grae] is his refusal to yield a constitutional privilege", the court unequivocally announced that "its exercise cannot be a breach of duty to the court" (282 N. Y., at p. 435).

The attorneys who refused to sign waivers of immunity in those proceedings were not, I am confident, any more cooperative or any more mindful of their "strict and special duties" or of their privileged posts in the affairs of men than the present appellant. And, I venture, the motives which prompted Grae and Ellis to assert their privilege were no different from those of the appellant.

Nor do *Matter of Grae* and *Matter of Ellis* stand alone in holding that an attorney's claim of privilege may not be treated as professional misconduct warranting disciplinary action.

[fol. 121] The question now before us first came to this court in 1907 in *Matter of Kaffenburgh* (188 N. Y. 49). Kaffenburgh was called as a witness on the trial of his employer for conspiracy to obstruct justice. He was asked questions relating to his possible participation in the conspiracy and declined to answer on constitutional grounds. This was one of the charges on which his disbarment was later sought, and as to it this court wrote (p. 53): "The defendant * * * had the right to refrain from answering any question which might form the basis of or lead to the prosecution of himself or a forfeiture of his office of attorney and counselor at law. * * * We are, therefore, of the opinion that no offense was stated in the first charge". The court's opinion herein attempts to distinguish *Kaffenburgh* upon the ground that it involved a trial and not an inquiry into the conduct of lawyers. In point of fact, it was the most serious kind of inquiry into the conduct of lawyers, taking, as it did, the form of a criminal prosecution. The questions put to Kaffenburgh dealt solely with his conduct in the practice of the law and, certainly, he was as much an officer of the court conducting the trial as the appellant here was of the court conducting the judicial inquiry.

Ten years later came *Matter of Rouss* (221 N. Y. 81), also cited by the majority. That decision, far from overruling *Kaffenburgh* on this point, actually confirmed it, for the court explicitly declared that "the charge was made that the refusal to answer was professional misconduct. That charge was not sustained either in the Appellate Division or in this court" (p. 90).

Twenty years after *Rouss* came *Matter of Solovei* (276 N. Y. 647, affg. 250 App. Div. 117). As a result of asserted irregularities in connection with a murder investigation in which the respondent therein represented one of the suspects, the Governor appointed an Extraordinary Special and Trial Term of the Supreme Court and a grand jury was drawn for that term. It indicted three persons

for murder, and, some time later, it also indicted certain others, including an office associate of the respondent, for the crime of conspiracy to obstruct justice. The respondent, named as a coconspirator, declined to waive immunity when questioned by the grand jury. That body thereupon presented charges to the Appellate Division. That court dismissed the charges, stating that "*Matter of Kaffenburgh* * * * decided that an attorney who in good faith refused to answer questions on the ground that they might tend to incriminate him was not amenable to disciplinary proceedings" (250 App. Div., at p. 121). The Appellate Division also commented on the nature of the proceedings, noting that, if it was not a breach of duty to the court to refuse to co-operate with it in a public trial, as in *Kaffenburgh*, it was surely no breach to claim the privilege in a private hearing (p. 120). As indicated, we affirmed without opinion. [fol. 122] Although the court in this case places considerable reliance upon *People ex rel. Karlin* v. *Culkin* (opinion, p. 495), it is noteworthy that that case did not involve a claim of privilege; the attorney simply refused to be sworn or testify. In affirming an order adjudging him in contempt, the court spoke of the duty of "co-operation" owed by an attorney in an inquiry such as the present, but it was careful to indicate that such "co-operation" on the part of the lawyer was "subject to his claim of privilege" (248 N. Y., at p. 471).

It is hardly necessary to say that a scrupulous regard for the constitutional limitation will not leave the disciplinary authority powerless or a guilty attorney immune. If, as counsel for the judicial inquiry stated toward the conclusion of the investigation, there was information indicating the appellant's "participation in professional misconduct", his unwillingness to testify might have justified institution of a disciplinary proceeding founded on the information at hand. And, if such proceeding were to be brought and the appellant were to stand mute therein, he would have to bear all of the legitimate inferences stemming from the damaging evidence adduced against him. It is also relevant that, where immunity is conferred—by overriding the claim of privilege and compelling the witness to answer the ques-

tions—and the testimony shows that he is not fit to continue as a lawyer, he may then be disbarred or otherwise disciplined. (See *Matter of Rouss*, 221 N. Y. 81, 86 *et seq.*, *supra.*)

In the present case, however, the appellant's claim of privilege was the sole ground relied upon to disbar him, and this fact cannot be altered or disguised by styling his conduct a "refusal to co-operate with the court". It is to substance, that we must look, not to form or labels. The courts should not sanction so easy an avoidance of a constitutional guarantee of a fundamental personal right.

To the charge that it is unthinkable that a lawyer "can retain his status and privileges as an officer of the court" after claiming his privilege (opinion, p. 495), I would answer, as did Mr. Justice LAZANSKY in his dissent in *Matter of Ellis* (258 App. Div. 558, 573, *supra*), that the charge "is based upon false assumption. Defiance and affront th[illegible] cannot be when the act has the sanction of the fundamental law of the land". It is, in short, my view that not only section 6 of article 1 of our Constitution but the decisions of this court considering and construing it require us to set aside the order of disbarment. Failure to do so can only mean that time has eroded the importance and vitality of the constitutional privilege against self incrimination.

I would reverse the order of the Appellate Division.

Judges DYE, FROESSEL, VAN VOORHIS, BURKE and FOSTER concur with Chief Judge DESMOND: Judge FULD dissents in a separate opinion.

Order affirmed.

[fol. 123]

IN THE COURT OF APPEALS OF NEW YORK

* * * * * * *

REMITTITUR—April 1, 1960

[fol. 124]

No. 30

In the Matter of ALBERT MARTIN COHEN, an attorney, Appellant,

DENIS M. HURLEY, Respondent.

Be It Remembered, That on the 25th day of January in the year of our Lord one thousand nine hundred and sixty, Albert Martin Cohen, an attorney, the appellant in this cause, came here unto the Court of Appeals, by David F. Price, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Denis M. Hurley, the respondent in said cause, afterwards appeared in said Court of Appeals in person.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 125] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Theodore Kiendl, of counsel for the appellant, and by Mr. Michael A. Castaldi, of counsel for the respondent, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

[fol. 126] Therefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,)
Albany, April 1, 1960.)

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[fol. 127]

IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION

In the Matter of ALBERT MARTIN COHEN, an attorney, Appellant,

DENIS M. HURLEY, Respondent.

ORDER ON REMITTITUR FROM COURT OF APPEALS —April 11, 1960

The above named Albert Martin Cohen, the appellant in this proceeding having appealed to the Court of Appeals of the State of New York from an order of the Appellate Division, Supreme Court, Second Judicial Department, entered in the office of the Clerk of said Court on the 31st day of December, 1959, which disbarred appellant from the practice of the law and directed that his name be struck

from the roll of attorneys of the State of New York as of the date of entry of said order, one Justice dissenting, with leave to appellant to apply to vacate said order upon proof that, within 30 days after the entry of said order, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum.

And the said appeal having been heard in the Court of Appeals, and after due deliberation the said Court of Appeals having ordered and adjudged that the order of this Court so appealed from be affirmed, without costs, and having further ordered that the record and proceedings herein be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be [fol. 128] proceeded upon according to law:

Now on reading the remittitur from the Court of Appeals of the State of New York dated April 1st, 1960, it is

Ordered, that the order of the Court of Appeals of the State of New York, be and the same hereby is made the order of this Court.

Enter:

Gerald Nolan, Presiding Justice.

[fol. 129]

In Court of Appeals of New York

* * * * * * *

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 275

In the Matter of Albert Martin Cohen, an attorney, Appellant,

Denis M. Hurley, Respondent.

Order Amending Remittitur—April 21, 1960

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appel-

lant herein and papers having been submitted thereon and due deliberation having been thereupon had:

Ordered, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: "The appellant asserted that his disbarment based solely upon his reliance in good faith on his constitutional privilege against self-incrimination in an non-adversary proceeding without any substantive charges of misconduct being made or proven against him at a full hearing where the right of confrontation and cross-examination of witnesses and full and ample defense would be available was violative of due process of law under the Fourteenth Amendment, and that his disbarment based on his assertion in good faith of his constitutional privilege against self-incrimination which the Appellate Division held constituted a refusal to cooperate with the Court and a breach of the Canons of Ethics violated his guarantees of due process of law under the Fourteenth Amendment." The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated.

And the Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, is hereby requested to [fol. 130] return said remittitur to this Court for amendment accordingly.

A copy.

Gearon Kimball, Deputy Clerk.

[fol. 131]

IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION

In the Matter of ALBERT MARTIN COHEN, an attorney, Respondent,

DENIS M. HURLEY, Petitioner.

ORDER ON MOTION FOR A STAY—April 27, 1960

The above named Albert Martin Cohen, an attorney, having been disbarred by an order of this court dated and entered December 31st, 1959, and his name directed to be struck from the roll of attorneys of the State of New York as of the date of entry of said order, one Justice dissenting, with leave to appellant to apply to vacate said order upon proof that, within 30 days after the entry of said order, he has answered before the Justice presiding at the Judicial Inquiry, all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum heretofore served, and by an order of this court dated and entered January 21st, 1960, respondent's motion to stay the operation of said order of disbarment pending appeal to the Court of Appeals having been granted, on condition that respondent be ready to argue or submit the appeal at the next term of the Court of Appeals, and having certified that a constitutional question was directly involved and no undertaking was required as a condition to the granting of the stay, and the said Albert Martin Cohen, respondent, having appealed to the Court of Appeals of the State of New York from said order of disbarment of this court, and the said Court of Appeals by remittitur dated April 1st, 1960, having ordered and adjudged that the said order of disbarment of this court so appealed from be affirmed, without costs, and having [fol. 132] further ordered that the record and proceedings be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon

according to law, and this court by order dated and entered April 11th, 1960, having made the order of the Court of Appeals the order of this court, and the said Court of Appeals of the State of New York on April 25th, 1960, having requested the return of said remittitur, so as to recite that upon the appeal questions under the Constitution of the United States had been presented and necessarily passed upon by said court, and to conform to that court's decision of April 21st, 1960, granting motion of Albert Martin Cohen, respondent, to amend remittitur, and the respondent having moved in this court for an order staying the operation of the order of disbarment of this court dated and entered December 31, 1959, pending the hearing and determination by the United States Supreme Court, upon the application of respondent to that court, of a petition for a writ of certiorari intending to bring the said order of disbarment of this court dated December 31, 1959, before the said Supreme Court of the United States for review, and for such other and further relief as to the court may seem just and proper, and the said motion for a stay having come on to be heard by an order to show cause dated April 15, 1960.

Now on reading and filing said order to show cause, the affidavit of Theodore Kiendl in support of said motion, and the affidavit of Denis M. Hurley in opposition thereto, and all the papers filed herein, and the said motion having been argued by Mr. Theodore Kiendl of Counsel for respondent Albert Martin Cohen, and argued by Mr. Denis M. Hurley, petitioner in person, and due deliberation having been had thereon:

It is Ordered that the said motion for a stay be and the same hereby is denied.

Nolan, P.J., Beldock, Ughetta and Christ, JJ., concur; Kleinfeld, J., dissents and votes to grant the motion.

Enter,

John J. Callahan, Clerk.

[fol. 134]

IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION

In the Matter of ALBERT MARTIN COHEN, an attorney, Appellant,

DENIS M. HURLEY, Respondent.

ORDER ON AMENDED REMITTITUR FROM COURT OF APPEALS —April 28, 1960

The above named Albert Martin Cohen, the appellant in this proceeding having appealed to the Court of Appeals of the State of New York from an order of the Appellate Division, Supreme Court, Second Judicial Department, entered in the office of the Clerk of said Court on the 31st day of December, 1959, which disbarred appellant from the practice of the law and directed that his name be struck from the roll of attorneys of the State of New York as of the date of entry of said order, one Justice dissenting, with leave to appellant to apply to vacate said order upon proof that, within 30 days after the entry of said order, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum.

And the said appeal having been heard in the Court of Appeals, and after due deliberation the said Court of Appeals having ordered and adjudged that the order of this Court so appealed from be affirmed, without costs, and having further ordered that the record and proceedings herein be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law; and the said Court of Appeals of the State of New York on April 25th, 1960, having requested the return of said remittitur, so as to [fol. 135] recite that upon the appeal questions under the

constitution of the United States had been presented and necessarily passed upon by said court, and to conform to that court's decision of April 21st, 1960, granting motion of appellant, Albert Martin Cohen, to amend remittitur, and the said remittitur having been amended by adding thereto the following:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: 'The appellant asserted that his disbarment based solely upon his reliance in good faith on his constitutional privilege against self-incrimination in an non-adversary proceeding without any substantive charges of misconduct being made or proven against him at a full hearing where the right of confrontation and cross-examination of witnesses and full and ample defense would be available was violative of due process of law under the Fourteenth Amendment, and that his disbarment based on his assertion in good faith of his constitutional privilege against self-incrimination which the Appellate Division held constituted a refusal to cooperate with the Court and a breach of the Canons of Ethics violated his guarantees of due process of law under the Fourteenth Amendment.' The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated."

Now on reading the remittitur from the Court of Appeals of the State of New York dated April 1st, 1960, as amended by order dated April 21st, 1960, it is

Ordered that the order of the Court of Appeals contained in said amended remittitur, be and the same hereby is made the order of this court.

Enter:

Gerald Nolan, Presiding Justice.

[fol. 137] Clerk's Certificate (omitted in printing).

[fol. 138]

SUPREME COURT OF THE UNITED STATES

No. 921, October Term, 1959

ALBERT MARTIN COHEN, Petitioner,

vs.

DENIS M. HURLEY.

ORDER ALLOWING CERTIORARI—June 6, 1960

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted. The case is transferred to the summary calendar and set for argument immediately following No. 661.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.